SUPREME COURT, U. S.

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No. 888

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

PACIFIC FAR EAST LINE, INC., ET AL., *Petitioners*

v.

PACIFIC SEAFARERS, INC., ET AL., *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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TABLE OF CONTENTS

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement of the Case	3
Reasons for Granting the Writ	8
A. The Decision Below Resolves a Novel and Important Question of Sherman Act Foreign Commerce Jurisdiction Contrary to the Holdings of This Court, Threatening Serious International Conflicts and Hampering the Foreign Activities of American Carriers	8
B. The Decision Below Assigns Legal Significance to AID's Financing Involvement in the Far East Interport Trade Contrary to This Court's Decision in *United States* v. *Concentrated Phosphate Export Ass'n*, to the Detriment of AID Operations	14
C. The Decision Below Improperly Limits the Application of the Doctrine of Collateral Estoppel and Curtails the Practical Effectiveness of the Doctrine of Primary Jurisdiction in Expert Administrative Determinations	16
Conclusion	20
Appendix A (Opinion of the Court of Appeals for the District of Columbia Circuit)	1a
Appendix B (Judgment of the District Court for the District of Columbia)	1b
Appendix C (Opinion of the Maritime Commission)	1c
Appendix D (Statutes Involved)	1d

TABLE OF CASES

Page

Alfred Bell & Co. v. *Catalda Fine Arts, Inc.*, 191 F. 2d 99 (2d Cir. 1951) 9
American Banana Co. v. *United Fruit Co.*, 213 U.S. 347 (1909) 9
British Nylon Spinners, Ltd. v. *Imperial Chemical Industries, Ltd.*, 2 All. E.R. 88 (Ct. App. 1952) 12
Carnation Co. v. *Pacific Westbound Conference*, 383 U.S. 213 (1966) 17
Carter v. *American Telephone & Telegraph Co.*, 365 F. 2d 486 (5th Cir. 1966), *cert. denied*, 385 U.S. 1008 (1967) 17
Chicago v. *Atchison, T. & S. F. Ry.*, 357 U.S. 77 (1958) 14
Continental Ore Co. v. *Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962) 9
Far East Conference v. *United States*, 342 U.S. 570 (1952) 17
Federal Maritime Board v. *Isbrandtsen Co., Inc.*, 356 U.S. 481 (1958) 16
Henslee v. *Union Planters' Nat'l Bank & Trust Co.*, 335 U.S. 595 (1949) 14
Investigation of Practices, Operations, Actions and Agreements West Coast of Italy, etc., Trade, 7 S. R.R. 515 (1966) 12
Knauff v. *Shaughnessy*, 338 U.S. 537 (1950) 11
Lauritzen v. *Larsen*, 345 U.S. 571 (1953) 12
Maddock & Miller, Inc. v. *United States Lines*, 365 F. 2d 98 (2d Cir. 1966) 17
McCleneghan Co. v. *Union Stock Yards Co.*, 298 F. 2d 659 (8th Cir. 1962) 17
Thomsen v. *Cayser*, 243 U.S. 66 (1917) 9
Timken Roller Bearing Co. v. *United States*, 341 U.S. 593 (1951) 9, 12
United States v. *Aluminum Company of America*, 44 F. Supp. 97 (S.D.N.Y. 1941), *aff'd on this point*, 148 F.2d 416 (2d Cir. 1945) 9, 12
United States v. *Concentrated Phosphate Export Ass'n*, No. 29 (Oct. Term 1968) 14, 15, 16
United States v. *Flores*, 289 U.S. 137 (1933) 11
United States v. *General Electric Co.*, 82 F. Supp. 753 (D. N.J. 1949) 9
United States v. *Hamburg-Amerikanische P.F.A. Gesellschaft*, 200 Fed. 806 (S.D.N.Y. 1911) 9

Page

United States v. *Imperial Chemical Industries, Ltd.*, 100 F. Supp. 504 (S.D.N.Y. 1951) 9
United States v. *Minnesota Mining and Manufacturing Co.*, 92 F. Supp. 947 (D. Mass. 1950) 10
United States v. *National Lead Co.*, 63 F. Supp. 513 (S.D.N.Y. 1945), *aff'd*, 332 U.S. 319 (1947) 10
United States v. *Pacific & Arctic Railway and Navigation Co.*, 228 U.S. 87 (1913) 9
United States v. *Sisal Sales Corp.*, 274 U.S. 268 (1927) 9
United States Navigation Co. v. *Cunard Steamship Co.*, 284 U.S. 474 (1932) 17
Vermilya Brown Co. v. *Connell*, 335 U.S. 377 (1949) .. 14
Yates v. *United States*, 354 U.S. 298 (1957) 19

STATUTES:

§14a Shipping Act, 46 U.S.C. §813 13
§15 Shipping Act, 46 U.S.C. §814 13
28 U.S.C. §2343 18

MISCELLANEOUS:

Moore, Federal Practice, ¶0.441[1], ¶0.443[5] 19
Whitney, *Sources of Conflict Between International Law and the Antitrust Laws*, 63 Yale L.J. 655 (1954) 10

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners pray that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on September 30, 1968, reversing the judgment of the United States District Court for the District of Columbia.

OPINIONS BELOW

The opinion of the Court of Appeals appears as Appendix A (p. 1a, *infra*), and is not yet reported.

The judgment of the United States District Court appears as Appendix B (p. 1b, *infra*), and is not reported.

The opinion of the Federal Maritime Commission appears as Appendix C (p. 1c, *infra*), and is reported at 8 F.M.C. 46 (1965).

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on September 30, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1964).

QUESTIONS PRESENTED

(1) Whether an alleged restraint of ocean carriage by American flag vessels of foreign goods for foreign principals between foreign ports is a restraint on the commerce of the United States with foreign nations within the jurisdiction of the Sherman Act?

(2) Whether the financing by AID of such wholly foreign shipments in American flag vessels brings an alleged restraint on such carriage within the jurisdiction of the Sherman Act?

(3) Whether a final and unappealed determination that the factual prerequisite for Sherman Act jurisdiction was not present, made by the Federal Maritime Commission in a contested administrative litigation between these same parties, required dismissal of this subsequent antitrust action based on the same facts and circumstances?

STATUTES INVOLVED

15 U.S.C. § 1	46 U.S.C. § 801
15 U.S.C. § 2	46 U.S.C. § 813
15 U.S.C. § 15	46 U.S.C. § 814

All reproduced in Appendix D (p. 1d, *infra*).

STATEMENT OF THE CASE

Per the opinion of the Court of Appeals (p. 6a, *infra*), "there is no real dispute" concerning the basic jurisdictional facts in this case. The jurisdictional conclusions of the Federal Maritime Commission are a matter of public record. Thus, this case squarely poses two basic legal issues:

(a) The reach of Sherman Act foreign commerce jurisdiction; and

(b) the collateral estoppel effect of the Federal Maritime Commission's decision on issues of fact fully and finally litigated between these parties.

Petitioners are American flag carriers some of whom engage in the carriage of foreign goods from one Far East port to another, commonly known as the "Foreign Interport" trade.* Some petitioners also engage in scheduled round trip voyages between United States and Far Eastern ports pursuant to lawful conference agreements duly filed with The Federal Maritime Commission. (pp. 2c-3c, *infra*).

As part of their foreign interport trade, some petitioners have secured carriage of foreign goods for

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* As the Court of Appeals noted "Liability is alleged as to most of the defendants [petitioners] by virtue of their participation in either the Atlantic and Gulf American-flag Berth Operators (AGAFBO) or the West Coast American-flag Berth Operators (WCAFBO) conferences, rather than from active participation in the Far East interport trade." (p. 2a, *infra*).

foreign principals between foreign Far Eastern ports primarily through commercial advantages arising from the activities of AID. Pursuant to governing statutes and regulations, AID conditions its financing of commodity purchases on the requirement that at least fifty percent of any necessary ocean carriage be by American flag vessels. In addition, AID will finance the cost of ocean carriage itself if 100 percent of financed commodities are carried in American flag vessels. (p. 4a, *infra*).

This Far East interport business was conducted pursuant to a conference agreement (AFBO). The Federal Maritime Commission has held that § 15 of the Shipping Act of 1916 does *not* permit filing for approval of the AFBO agreement—because it does not govern or affect shipping between United States and foreign ports, and because it is not related to, or interdependent with those agreements which govern petitioners' activities in United States foreign commerce. (Appendix C, *infra*).

Respondent, Pacific Seafarers, and its affiliate Seafarers, Inc.,* entered the Far East interport trade solely to compete for the carriage of foreign shipments for foreign principals. Respondents did *not* carry United States Government cargo, and did *not* engage in commercial voyages to or from United States ports. (p. 6a, *infra;* p. 2c, *infra*).

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* Respondents' complaint included as plaintiffs Great Lakes Bengal Lines, Inc., Mid-America Steamship Corp. and J. J. Georgelis, Inc. all of which were owned and managed by the management of Pacific Seafarers and were alleged to have suffered injury consequential to the alleged injury to Seafarers. Petitioners' motion to dismiss these plaintiffs, as well as other motions, were not considered by the District Court because of its jurisdictional dismissal. (Appendix B, *infra*).

Respondents' antitrust complaint alleged that petitioners engaged in a number of actions designed to oust respondents from the nonmilitary Far East interport trade in the transportation of foreign cement and fertilizer for foreign principals from Taiwan/Thailand to South Vietnam, culminating in suspension of the AFBO agreement with respect to rates on certain commodities financed by AID, after which all carriers competed without rate agreements. Respondents allege that thereafter the rates dropped to a low level which eventually forced respondents from the Far East interport trade. (p. 5a, *infra*).

Respondents initiated this case by seeking reparation in a Federal Maritime Commission proceeding under the Shipping Act of 1916 for those same acts now labeled antitrust violations. (J.A. 38-51).*

Petitioners and respondents contested the jurisdiction of the Maritime Commission over activities in the Far East interport trade and the merits of respondents' allegations. After plenary consideration leading to a record of 106 exhibits and 1161 pages of testimony, the Maritime Commission's Hearing Examiner reached an initial decision finding for petitioners on both issues.** (J.A. 54-111).

With respect to Shipping Act jurisdiction, respondents asserted that it should be measured by Sherman Act standards while petitioners argued that only conferences involving United States ports were covered.

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* J.A. refers to the Joint Appendix in the Court of Appeals.

** On the merits, the initial decision concluded that "it was not the Rate Agreement or any 'related agreement,' or even the opening of rates that harmed PSI, but the rates which were independently established following the opening." (J.A. 95).

Petitioners also denied that the factual prerequisites for Sherman Act jurisdiction were present. (J.A. 88-97).

The initial decision did not reach the disputed legal issue, but held on the record that "neither the rate agreement nor any 'related understanding' affected the commerce of the United States," and that AID's financial involvement could not "convert complainant's business into commerce of the United States." (J.A. 103).

On exceptions to the Initial Decision, the Maritime Commission affirmed the jurisdictional dismissal of respondent's complaint. The Commission concurred with the key factual findings in the initial decision that respondents carried only foreign cargo for foreign principals between foreign ports (p. 2c, *infra*), and ruled that the Far East interport trade was not foreign commerce of the United States within the Shipping Act because it did not involve carriage from or to United States ports. (p. 4c, *infra*).

Alternatively, viewing the facts under Sherman Act legal standards put forward by respondent, the Commission found that "the AFBO agreement neither directly nor materially affected our foreign commerce." (p. 9c, *infra*). Moreover, based on the proof as to AID's involvement in these transactions, which was "only in the capacity of a financing institution," the Commission held that AID's involvement "does not convert foreign-to-foreign commerce into foreign commerce of the United States." (p. 5c, *infra*).

Respondents did not exercise their right to appeal from the Maritime Commission's final jurisdictional

dismissal. Instead, months later, respondents commenced this Sherman Act action based on the same facts and alleged injuries. (p. 2a, *infra*).

In the District Court, petitioners moved to dismiss this action because the complaint itself and the Maritime Commission's final unappealed decision established that respondents had not alleged and were precluded by the doctrines of collateral estoppel and primary jurisdiction from alleging a restraint on the commerce of the United States with foreign nations. (p. 3a, *infra*). (J.A. 33-37)

The District Court held it was without jurisdiction over the subject matter of the complaint and dismissed without opinion on the jurisdictional issue. (Appendix B, *infra*).

The Court of Appeals reversed, holding first that the Maritime Commission's final determination, although binding on these parties, did not foreclose Sherman Act jurisdiction because it was based on the Shipping Act rather than the Sherman Act. (p. 6a, *infra*).

Turning to the jurisdictional issue which it considered "res nova," the Court of Appeals acknowledged that Sherman Act jurisdiction could be found only if respondents were engaged in the foreign commerce of the United States, but held that respondents' sales of American flag ocean transportation to foreigners potentially improved the United States balance of payments, and thus were "a form of United States foreign trade." (p. 13a, *infra*). The Court also found Sherman Act jurisdiction supported by a "definite nexus" between the Far East interport trade and "sig-

nificant interests of the United States" based on Congressional interest in our maritime industry and those AID policies which provide commercial advantages to American flag vessels. (pp. 19a-21a, *infra*).

REASONS FOR GRANTING THE WRIT

A. The Decision Below Resolves a Novel and Important Question of Sherman Act Foreign Commerce Jurisdiction Contrary to the Holdings of This Court, Threatening Serious International Conflicts and Hampering the Foreign Activities of American Carriers.

This case presents, in an unclouded jurisdictional posture, and without factual dispute, the question whether the carriage of foreign goods for foreign principals between foreign ports by an American flag vessel is "commerce of the United States with foreign nations" within the meaning of the Sherman Act.

Respondents' antitrust complaint alleged that petitioners attempted to foreclose respondents *only* in their carriage of foreign cement and fertilizer for foreign principals between Thailand Taiwan and South Vietnam. No claim was advanced that respondents made commercial voyages to or from United States ports nor that they carried United States imports, exports or Government cargo. The adverse effect alleged to flow from petitioners allegedly unlawful conduct was exclusion of respondents from this wholly foreign Far East interport trade.

Seventy-seven years of Sherman Act history, the bulk of it written by this Court, make it clear that in determining whether challenged conduct constitutes a forbidden restraint on the "commerce of the United States with foreign nations," the courts in Sherman Act cases must determine whether there is a direct or

material effect on United States foreign commerce by assessing the alleged effects on United States imports and exports or transportation between the United States and foreign ports. See, e.g., *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 704 (1962) (United States vanadium exports).*

Thus, where there is no substantial effect on United States imports and exports or transportation between the United States and foreign ports, the courts have consistently asserted an absence of Sherman Act jurisdiction even where the alleged perpetrator and victim of the claimed antitrust violations were American nationals. E.g., *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909) (dismissing charges of conspiracy to expropriate American plaintiff's foreign banana plantations); *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F. 2d 99, 105 (2d Cir. 1951) (no antitrust violation arises from price fixing agreement "explicitly confined to Great Britain and Ireland" which "did not affect sales in the United States"); *United States v. Aluminum Company of America*, 44 F. Supp.

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* See also *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 599 (1951) (imports and exports of industrial bearings); *United States v. Sisal Sales Corp.*, 274 U.S. 268 (1927) (United States sisal imports); *United States v. Pacific & Arctic Railway and Navigation Co.*, 228 U.S. 87 (1913) (transportation between United States and Alaska); *Thomsen v. Cayser*, 243 U.S. 66 (1917) (shipping from United States to South Africa); *United States v. Aluminum Company of America (ALCOA)*, 148 F. 2d 416, 444 (2d Cir. 1945) (exports and imports of aluminum ingot); *United States v. Imperial Chemical Industries*, 100 F. Supp. 504, 591-592 (S.D.N.Y. 1951) (exports and imports of explosive powder); *United States v. General Electric Co.*, 82 F. Supp. 753, 891 (D.N.J. 1949) (exports and imports of incandescent lamps); *United States v. Hamburg-Amerikanische P.F.A. Gesellschaft*, 200 Fed. 806 (S.D.N.Y. 1911) (passenger transportation between United States and Europe).

97, 246 (S.D. N.Y. 1941), *aff'd on this point*, 148 F. 2d 416 (2d Cir. 1945) (acquisition of controlling interest in foreign companies whose sales "were wholly or almost wholly confined within the countries where they respectively were located" not within Sherman Act jurisdiction when it had not "directly or materially affected the commerce of the United States"). Cf. *United States* v. *National Lead Co.*, 63 F. Supp. 513, 520, 524 (S.D. N.Y. 1945), *aff'd*, 332 U.S. 319 (1947) (court would be "without jurisdiction" to consider the price fixing and division of territory agreements applicable to Eastern Europe and British Empire "as such"); *United States* v. *Minnesota Mining and Manufacturing Co.*, 92 F. Supp. 947, 958. (D. Mass. 1950) ("It is axiomatic that if over a sufficiently long period American enterprises, as a result of political or economic barriers, cannot export directly or indirectly from the United States to a particular foreign country at a profit, then any private action taken to secure or interfere solely with business in that area, whatever else it may do, does not restrain foreign commerce in that area in violation of the Sherman Act").

In this case, however, while the Court of Appeals recognized that there had "never before been a ruling affirming application of the [Sherman] Act to this kind of trade," it declared the matter "res nova" and proceeded to resolve it on a basis which raises the spectre of unlimited global application of the Sherman Act. (p. 18a, *infra*).

Inevitably, such a doctrine would provoke, as every broad expansion of foreign commerce jurisdiction, "a whole mass of potential conflicts." Whitney, *Sources of Conflict Between International Law and the Antitrust Laws*, 63 Yale L. J. 655, 660 (1954).

Thus, the Court of Appeals first held that respondents were engaged in the foreign commerce of the United States because they were American nationals selling a commercial service to foreigners and thus their earnings might be beneficial to the United States balance of payments. (p. 13a, *infra*).

Under this sweeping principle, *any* commercial activity by Americans abroad, whether related to shipping or not and no matter how local in character, would be considered commerce of the United States with foreign nations *and subject* to the reach of the Sherman Act.*

The practical impact of the Court of Appeals' decision is both widespread and unfortunate. As American businesses engage in ever more extensive foreign operations, the possibility that their foreign activities will be affected by the competitive actions of American or foreign rivals correspondingly mounts. Given the Court of Appeals' ruling that any such restraint of American commercial activities abroad brings the alleged perpetrators within the reach of the Sherman Act, and the accepted extension of the Sherman Act to the acts of foreign nationals abroad, there is a substantial threat of conflict between American courts exercising Sherman Act jurisdiction and foreign courts

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* The Court of Appeals attempted to support its contention that American flag vessels were *ipso facto* engaged in United States foreign commerce by pointing out that the National Labor Relations Act applied to American vessels in foreign interport trades. However, as that court agreed, it is a recognized principle of international law that on-board conduct and regulation of the crew are subject to the laws of the flag nation. *United States* v. *Flores*, 289 U.S. 137 (1933). And Congress has inherent power to regulate such affairs, much as it regulates immigration, as an attribute of sovereignty. See *Knauff* v. *Shaughnessy*, 338 U.S. 537 (1950).

acting under more permissive local commercial regulations. See *Timken Roller Bearing Co.* v. *United States,* 341 U.S. 593 (1951) (Sherman Act prohibits agreements between American, British and French corporations affecting United States imports and exports); *United States* v. *ALCOA,* 148 F. 2d 416, 443 (2d Cir. 1945) (warning of "international complications" from overextensive Sherman Act jurisdiction); *British Nylon Spinners, Ltd.* v. *Imperial Chemical Industries, Ltd.,* 2 All. E.R. 88 (Ct. App. 1952) (refusal to enforce United States antitrust decree as applied to transfer of patents within Great Britain because decree infringed upon "rights and sovereign authority" of British Courts).

This practical problem is particularly compelling in the international maritime industry. As pointed out by this court in *Lauritzen* v. *Larsen,* 345 U.S. 571, 581 (1953):

> "[T]he virtue and utility of sea-borne commerce lies in its frequent and important contacts with more than one country. If, to serve some immediate interest, the courts of each were to exploit every such contact to the limit of its power, it is not difficult to see that a multiplicity of conflicting and overlapping burdens would blight international carriage by sea."

Moreover, the difficulties for American flag carriers are compounded by the lower court's application of the Sherman Act to an area of wholly foreign commerce in which the Maritime Commission will *not* accept for approval conference agreements like AFBO under the Shipping Act. (Appendix C, *infra*); see, e.g., *Investigation of Practices, Operations, Actions*

and Agreements West Coast of Italy, etc., Trade, 7 S.R.R. 515, 531 (1966).

Thus the result of this unprecedented Sherman Act jurisdictional extension by the lower court could be to deny to American carriers in foreign interport trades the right to regulate their activities jointly which they possess in United States foreign commerce by virtue of § 15 of the Shipping Act, and which Congress has found essential for sound maritime development. See 46 U.S.C. § 814.

In addition, the Court of Appeals' decision may undercut the policy of § 14a of the Shipping Act which denies United States port privileges to foreign carriers refusing American carriers admission to "foreign interport" conferences and thus encourages American participation in such rate conferences. Application of the Sherman Act to such conferences would, contrary to clear Congressional intent, make criminal liability an impassable barrier to American carriers wishing to participate in private foreign interport trade.

In short, the Court of Appeals decision in this case, together with the final decision of the Maritime Commission, leaves American carriers wishing to participate in foreign interport trade plying a course between Scylla and Charybdis.*

In sum, the novel jurisdictional question presented in this case has far reaching importance for American carriers as well as substantial legal importance.

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* The practical effect of the lower court's casual suggestion that the Commission might have erred in its own view of its own Shipping Act jurisdiction (p. 22a, *infra*) in resolving this policy conflict is, of course, completely unclear at this juncture.

Because this case poses the legal issue free of factual dispute, and because of the existing policy conflict between the decisions of the Court of Appeals and the Maritime Commission, there are compelling reasons for plenary review by this Court.*

B. The Decision Below Assigns Legal Significance to AID's Financing Involvement in the Far East Interport Trade Contrary to This Court's Decision in United States v. Concentrated Phosphate Export Ass'n, to the Detriment of AID Operations.

In an attempt to bolster its prima facie nationality jurisdiction principle, the lower court constructed "a definite nexus with significant interests of the United States" for the wholly foreign Far East interport trade based on AID's involvement. (p. 19a, *infra*). The court focused on the undisputed fact that AID's restrictions on the financing of cargo carried in foreign bottoms were designed to encourage commercial utilization of American flag carriers and that the largest part of AID financed cargo in this trade was carried by American vessels. *Ibid.*

Without basis in the record, and in direct contradiction of the findings of the Maritime Commission, the court then attempted to analogize this purely financial involvement of AID in the Far East interport trade to AID's activities in relation to the commodity purchases at issue in *United States* v. *Concentrated Phos-*

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* The jurisdictional posture of the case poses no barrier to *certiorari*. *Chicago* v. *Atchison T., & S.F. Ry.*, 357 U.S. 77 (1958); *Vermilya Brown Co.* v. *Connell*, 335 U.S. 377 (1949); *Henslee* v. *Union Planters' Nat'l Bank & Trust Co.*, 335 U.S. 595 (1949).

phate Export Ass'n No. 29 (Oct. Term 1968). (pp. 19a-20a, *infra*).

Actually, based on an official affidavit from AID's Administrator submitted by respondents, the Maritime Commission found as a fact that "neither AID nor any other agency of our Government participated in any of the commercial or shipping transactions. AID's concern began and ended with its role as a financier." (pp. 4c-5c, *infra*).

In *United States* v. *Concentrated Phosphate Export Ass'n, supra* at p. 9, this court held that "the economic reality of the relevant transactions" was the key to the legal importance of AID participation and denied the Webb-Pomerene exemption because the sales involved were essentially sales to our Government.

Here, in direct opposition to *Concentrated Phosphate*, AID did *not* select carriers, did *not* book space, did *not* enter into ocean-carriage contracts and did *not* pay the bill. (p. 5c, *infra*). AID merely offered financing terms which increased the commercial attractiveness of United States flag vessels to foreign shippers. Thus, the "economic reality" of the Far East interport trade, and AID's limited involvement, negates the basis and rationale for importation of Sherman Act concepts into such wholly foreign ocean carriage.

Actually, if AID's limited involvement in the Far East interport trade were held to create Sherman Act jurisdiction, AID's foreign operations would be made less effective.

For example, if American carriers engaged in foreign interport trade under otherwise exempt conferences

faced the risk of Sherman Act criminal prosecution merely by carrying AID cargo, they might well decide to refrain from such carriage and thus undercut the Congressional policy of encouraging maximum American participation in such trade.

Moreover, foreign commodity suppliers might well hesitate to participate in AID financed transactions for fear that commercial arrangements lawful in their own countries could fall afoul of the Sherman Act, on pain of criminal prosecution or treble damages to American competitors claiming injury from such foreign arrangements.

In sum, the factual polarization between this case and *Concentrated Phosphate* would permit this Court to delineate the boundaries of its "economic reality" theory of Sherman Act jurisdiction in AID programs and thus presents further substantial reason for granting of the writ.

C. The Decision Below Improperly Limits the Application of the Doctrine of Collateral Estoppel and Curtails the Practical Effectiveness of the Doctrine of Primary Jurisdiction in Expert Administrative Determinations.

Under the leadership of this Court, the doctrine of primary jurisdiction has developed to provide "a division of functions between court and agency." *Federal Maritime Board* v. *Isbrandtsen Co., Inc.*, 356 U.S. 481, 498 (1958). Primary jurisdiction requires that antitrust actions in regulated industries be stayed pending the type of administrative proceeding which has already occurred in this case and which is required both to eliminate policy conflicts between court and agency and because "the factual issues can often be handled best by the administrative agency in the light

of its extensive experience in dealing with the industry." *Maddock & Miller, Inc.* v. *United States Lines*, 365 F.2d 98, 102 (2d Cir. 1966).*

Because of the increasing frequency of primary jurisdiction referrals and the time and energy spent in contests before administrative agencies, it is of critical importance that agency fact findings on contested, relevant issues in areas of agency expertise be given the fullest respect in subsequent judicial proceedings between the same parties.

The lower court, while paying lip service to the doctrine of collateral estoppel, sharply limited its scope, contrary to the overwhelming weight of authority, because the Federal Maritime Commission's "determination rested solely on the standards of the Shipping Act of 1916." (p. 6a, *infra*).

Actually, as the initial and final decisions of the Maritime Commission make clear, respondents vigorously asserted before that agency that Sherman Act principles should govern jurisdiction under the Shipping Act. (p. 9c, *infra;* J.A. 88). Based on later-abandoned claims of carriage of Government-owned cargo transshipped in the Far East and vague assertions of headquarters and repair activities in the United States, respondents attempted to prove to the Commission that the alleged interference with their

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* See *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213, 224 (1966); *Far East Conference* v. *United States*, 342 U.S. 570 (1952); *United States Navigation Co.* v. *Cunard Steamship Co.*, 284 U.S. 474 (1932). See also *Carter* v. *American Telephone & Telegraph Co.*, 365 F. 2d 486, 498-500 (5th Cir. 1966); *McCleneghan Co.* v. *Union Stock Yards Co.*, 298 F. 2d 659, 670 (8th Cir. 1962) (staying antitrust suits pending administrative proceedings in other regulated industries).

activities substantially affected United States foreign commerce.

To be sure, the Maritime Commission rejected the applicability of Sherman Act jurisdictional principles as a matter of Shipping Act interpretation. (p. 4c, *infra*).

However, the Commission *found as a fact*, affirming its initial decision, that even under Sherman Act principles the allegedly unlawful activities "neither directly nor materially affected our foreign commerce." (p. 9c, *infra*).

Thus, it would not have been enough for respondents to reverse the Commission's Shipping Act interpretation on appeal. They would further have been required to overthrow the Commission's factual rejection of their position, based on expert administrative review of the extensive and fully contested record, in order to assert Shipping Act jurisdiction even under the broadest Sherman Act jurisdictional principles.*

It is well established that "determinations of fact, and mixed law and fact" are "conclusive in subsequent

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* In view of the lower court's gratuitous but pregnant observation that "it may well be . . . insofar as agreements affecting foreign commerce are concerned, the Commission was in error in its narrow view of Shipping Act jurisdiction," the possibility of reversing the Commission's legal ruling was not at all remote in the event of direct appeal of the Commission's decision to *this* Court of Appeals. (p. 22a, *infra*)

The real question *here* is whether respondents are entitled to retry collaterally, in the guise of antitrust attacks, the Commission's factual holding that "the AFBO agreement neither directly nor materially affected our foreign commerce." (p. 9c, *infra*), after defaulting on their statutory rights of direct appeal. 28 U.S.C. § 2343.

proceedings" between parties who have once litigated them. *Yates* v. *United States,* 354 U.S. 298, 336 (1957); see Moore, *Federal Practice,* ¶ 0.441[1] (citing cases). Moreover, alternative holdings on contested issues warrant similar collateral estoppel effect. Moore, *supra,* ¶ 0.443[5].

Thus, traditional application of the doctrine of collateral estoppel in this case required dismissal of respondents' complaint for failure to establish the essential factual prerequisite of Sherman Act jurisdiction —i.e., a direct or substantial effect on the commerce of the United States with foreign nations.

The lower court's refusal to do so improperly curtailed this salutary doctrine, so essential to prevent multiple and collateral litigation, in an area where its broadest possible application is essential to give due regard to the finality of administrative determinations in regulatory matters.

The findings of the Maritime Commission in this case are final. There is no doubt that the issues were fully litigated between these parties and known to be of importance before the Commission.

Thus, certiorari is additionally warranted to resolve in unclouded circumstances the critical question of the scope to be accorded to regulatory agency findings, in an area of agency expertise, in subsequent judicial litigation between the same parties.

CONCLUSION

For the reasons set forth, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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American Mail Line, Ltd.;
Isthmian Lines, Ltd.;
States Steamship Company;
West Coast American Flag
Berth Operators

(Petitioners Lykes Bros.
Steamship Co., Inc.;
United States Lines Company;
Alcoa Steamship Company, Inc.;
Bloomfield Steamship Company;
Central Gulf Steamship
Corporation;
Prudential Lines, Inc.;
Stevenson Line, Inc.;
Stockard Shipping Co., Inc.;
American & Gulf Flag
Berth Operators;
American Union
Transport, Inc.;
Farrell Lines, Inc.;
Matson Navigation Company;
Waterman Steamship
Corporation;
American Export Isbrandtsen
Lines, Inc.;
Moore and McCormack Co., Inc.;
Grace Line Inc. Also Join in
This Petition).

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December 30, 1968

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,173

PACIFIC SEAFARERS, INC., ET AL.,
Appellants

v.

PACIFIC FAR EAST LINE, INC., ET AL.,
Appellees

Appeal from Order and Judgment of the United States District Court for the District of Columbia

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Decided September 30, 1968

Mr. Robert E. Sher, with whom *Messrs. Abraham J Harris, Marvin J. Coles* and *Neal M. Mayer* were on the brief, for appellants. *Mr. Donald D. Webster* also entered an appearance for appellants.

Mr. Frederick M. Rowe, with whom *Messrs. James M. Johnstone, Bertram Walter Rein, Edward D. Ransom, Gordon L. Poole* and *R. Frederic Fisher* were on the brief, for appellees, Pacific Far East Line, Inc., et al.

Mr. Verne W. Vance, Jr., with whom *Mr. Henry E. Foley* was on the brief, for appellee Farrell Lines, Inc.

Messrs. James N. Jacobi and *Richard W. Kurrus* entered appearances for appellee American Export Isbrandtsen Lines, Inc.

Mrs. Amy Scupi entered an appearance for appellee American Union Transport, Inc.

Mr. Robert Burk entered an appearance for appellee Matson Navigation Company.

Mr. J. Franklin Fort entered an appearance for appellee Moore and McCormack Co., Inc.

Mr. Donald J. Mulvihill entered an appearance for appellee Grace Line, Inc.

Mr. John K. Mallory, Jr., entered an appearance for appellee Waterman Steamship Corporation.

Mr. Elmer C. Maddy entered an appearance for appellee Lykes Bros. Steamship Co., Inc., et al.

Before McGowan, Tamm and Leventhal, *Circuit Judges.*

Leventhal, *Circuit Judge:* This case concerns the applicability of sections 1 and 2 of the Sherman Act to an alleged conspiracy among defendant-appellees, 21 American shipping lines and two conferences to which they belong,[1] to destroy plaintiff-appellants' business of carrying AID[2]-financed cement and fertilizer cargoes between Taiwan and South Vietnam. The charges were first aired before the Federal Maritime Commission, which dismissed plaintiffs' complaint alleging violations of sections 15, 16 First, and 18 of the Shipping Act[3] on the ground that this trade between foreign ports, of goods owned and shipped by foreigners to foreigners,[4] was not within the Commission's

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[1] Liability is alleged as to most of the defendants by virtue of their participation in either the Atlantic and Gulf American-flag Berth Operators (AGAFBO) or the West Coast American-flag Berth Operators (WCAFBO) conferences, rather than from active participation in the Far East interport trade.

[2] Agency for International Development.

[3] 46 U.S.C. §§ 814, 815 First, 817, respectively.

[4] The Federal Maritime Commission found that "The cargoes carried by PSI are entirely commercial in nature originating in one foreign port and destined to another foreign port. The shipping arrangements as well as the sales of the commodities are made between foreign principals. Although the U.S. Government through the Agency for International Development (AID) ultimately finances the sales—including the cost of water transportation—our Government in no way participates in the transactions." (JA 114)

jurisdiction under the Shipping Act. That ruling was not appealed. Plaintiffs' subsequently-filed complaint for damages under the antitrust laws[5] was dismissed, at the close of oral argument, when the District Court granted defendant's motion for dismissal of the complaint. This order was presumably based on the jurisdictional ground that the Sherman Act was inapplicable to the complaint because of the absence of a claim of restraint of foreign commerce.[6] We reverse that determination.

These are the pertinent facts as set forth in the complaint, which must be accepted as true for purposes of a motion to dismiss. Plaintiffs Pacific Seafarers, Inc. (PSI) and Seafarers, Inc. (Seafarers)[7] are American corporations, formerly engaged in the ocean shipping business. They operated United States flag vessels, manned by American crews. Plaintiffs' business operations were centered in New York, and their ships intermittently returned to the United States for personnel and maintenance requirements. Plaintiffs' business was selling their American-flag shipping services to cement and fertilizer exporters in Taiwan, and, to a lesser extent, Thailand, who needed American-flag shipping for AID-financed sales to importers in South Vietnam. AID does not own the goods, nor does it arrange for their transportation. It does, however, provide, either on loan or grant basis, dollars to the South Vietnamese Government, which in turn sells these dollars to South Vietnam merchants desiring to finance their purchases abroad. AID implements the Cargo Preference Law[8] by

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[5] 15 U.S.C. § 15.

[6] The District Judge rendered his decision from the bench at the close of oral argument. He stated: "I am of the opinion that the complaint does not state facts constituting a cause of action under the Sherman Antitrust Act and, therefore, this Court is without jurisdiction and the motions to dismiss will be granted." (JA 167)

[7] The other plaintiffs' claims are derivative.

[8] 46 U.S.C. § 1241(b). See AID Regulation 1, § 201.6(N).

regulations requiring that at least 50% of AID-financed cargoes be transported to the recipient country in privately owned United States-flag commercial vessels. Furthermore, as a matter of policy, AID finances the costs of transportation, in addition to cargo, where the shipping is done in American-flag vessels.[9] These regulations effectively reserve the trade in carriage of AID-financed cargo for American shipping.

At the time plaintiffs entered the business it was handled primarily by American-flag competition engaged in round-trip voyages from the United States to the Far East. In the course of their journeys, these vessels would stop to take on cargoes of foreign origin destined for ports farther along. The rate for this service was set by AFBO,[10] an association of American-flag carriers which are members of either or both AGAFBO[11] or WCAFBO,[12] both conferences of American-flag shippers organized to carry military cargoes for the Government (which must likewise use American-flag shipping where available). Neither the AFBO agreement, nor the rates set thereunder for cargoes originating in foreign ports and destined to foreign ports, were filed with the Federal Maritime Commission.

Plaintiffs thought that by using older, less-expensive vessels they could institute and profitably operate a substantial service in AID-financed cargoes. As stated by plaintiffs, defendant American-flag shipping lines acted to preserve this profitable trade to themselves, at rates set pursuant to concerted action and not subject to regulatory scrutiny. They first sought to erect legal barriers to plaintiffs' getting the buisness, and when they failed in

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[9] Affidavit of David E. Bell, former Administrator of AID. (JA 147)

[10] American-flag Berth Operators.

[11] Atlantic-Gulf American-flag Berth Operators.

[12] West Coast American-flag Berth Operators.

that endeavor they dropped their prices and drove plaintiffs out of business.

(a) Their first effort was to seek issuance of a directive from AID limiting AID-financed shipping in the area to "conference liners." That would have excluded plaintiffs' vessels, but it was not obtained.

(b) Defendants then successfully urged the Director General of Commerce of South Vietnam to issue a ruling to South Vietnamese importers requiring that all future AID-financed shipments of cement be shipped on liners operated by AFBO members. Plaintiffs were not then members of AFBO, but AID countermanded that directive.

(c) Next, plaintiff PSI was told by the Director General that it would have to join WCAFBO if it wished to continue in the South Vietnamese cement business. When PSI tried to comply, its application for membership was blocked because it had no Military Sea Transportation Service Contract (MSTS) with the Defense Department, as did all other WCAFBO members. Plaintiff sought such a general elegibility contract, and seven of the appellees tried to block it by protesting to the Defense Department. That too, was unsuccessful.

(d) Finally, at an AFBO meeting held in the United States, the rates on cement and fertilizer from Taiwan to South Vietnam, and on cement from Thailand to South Vietnam were thrown open, and they dropped from $8.95 per long ton to $4.96 per long ton. All other rates were maintained.

Plaintiffs were shortly driven out of business. Thereafter defendants raised the rates, and indeed raised them to substantially higher levels than those prevailing before plaintiffs sought to enter the trade.

1. We first consider defendants' arguments that principles of collateral estoppel and "practical primary jurisdiction considerations" preclude relitigation by plaintiffs

of the Federal Maritime Commission's determination that this trade, carried on "totally within the confines of Far Eastern ports," was not part of "our foreign commerce."

Principles of collateral estoppel may properly be applied in administrative cases.[13] In general these principles apply to jurisdictional issues[14] and we may assume that they require giving effect in subsequent litigation to an agency's determination of facts underlying its conclusion that jurisdiction was lacking. In this case, however, there is no real dispute concerning those facts which the Commission held to be jurisdictional. Thus, plaintiffs do not seriously allege that they were plying a trade other than selling shipping services to foreigners, for transportation of foreign-owned goods to foreign consignees. They do not allege that the goods thus transported between foreign ports originated in the United States. On the other hand, defendants cannot seriously contest that the key to this whole trade was that plaintiffs and defendants were not just selling shipping services: They were selling United States-flag shipping services, which fact was of crucial importance to importers requiring AID-dollar financing for their transactions. Thus the sole question is whether, under those facts, a conspiracy to drive plaintiffs out of the business of selling United States-flag shipping services is a restraint on United States foreign commerce subject to the Sherman Act.

Although the Commission was of the view that defendant's activities had no effect on United States "foreign commerce," that determination rested solely on the standards of the Shipping Act of 1916. Thus the Commis-

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[13] United States v. Utah Constr. & Min. Co., 384 U.S. 394, 422 (1966); Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 402-03 (1940); Fairmont Aluminum Co. v. Commissioner, 222 F. 2d 622, 627 (4th Cir.), *cert. denied*, 350 U.S. 838 (1955); 2 Davis, Administrative Law §§ 18.01-18.10 (1958).

[14] Sunshine Anthracite Coal Co. v. Adkins, *supra*, 310 U.S. at 403; Esteves v. Nabers, 219 F. 2d 321, 323-24 (5th Cir. 1955).

sion held that its entire jurisdiction was limited to activities affecting "foreign commerce" within the intendment of section 1 of the Shipping Act,[15] which defines a "common carrier by water in foreign commerce" as a "common carrier engaged in transportation by water of passengers or property between the United States or any of its Districts, Territories, or possessions and a foreign country." As plaintiffs carried no property or passengers to or from the United States they were not engaged in foreign commerce under the Shipping Act.[16]

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[15] 46 U.S.C. § 801.

[16] Section 15 of the Shipping Act provides that, "Every common carrier by water, or other person subject to this chapter, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum of every agreement with another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements." 46 U.S.C. § 814.

The Commission thus substantially limited the broad term "every agreement," presumably on the grounds that the sole concern of the Shipping Act was with that trade which by virtue of § 1 made anyone carrying it subject to the Act. A similar approach, albeit in a different context, was rejected by the Supreme Court in Volkswagenwerk Aktiengesellschaft v. FMC, 390 U.S. 261 (1968).

Moreover, the Commission held that, in the AFBO context, the defendants "cannot be deemed to be engaged in the foreign commerce of the United States, . . . for the simple reason that the trade does not involve as one terminus any port in a State, District, Territory or possession of the United States."

The Commission did not rule that there was no "foreign commerce" as that term is used in the Sherman Act, nor did it rule that the standards under the two acts were the same. It is commonplace in the law to encounter instances of the same words being given different scope in different contexts.[17] Indeed counsel for the defendants effectively put it to the Commission that jurisdiction under the Shipping Act is narrower than under the Sherman Act, and counsel objected to antitrust principles being "dragged in by the heels."[18] Accordingly defendants cannot bootstrap

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[17] Smiley v. Holm, 285 U.S. 355 (1932); Atlantic Cleaners & Dyers, Inc. v. United States, 286 U.S. 427, 434 (1932); Sampson v. Channell, 110 F. 2d 754 (1st Cir.), *cert. denied*, 310 U.S. 650 (1940); *Cf.* Towne v. Eisner, 245 U.S. 418 (1918); Cook, "Substance" and "Procedure" in the Conflict of Laws, 42 Yale L.J. 333, 337 (1933).

[18] The following colloquy took place at oral argument before the Commission:

Commissioner Hearn: Now, do you contend that, furthering Mr. Patterson's question, do carrier members of AFBO, purely by reason of the foreign inter-port carriage, can act with impunity so far as this Commission is concerned, dealing with MSTS and AID cargo, even to the detriment of the United States-flag carrier?

Mr. Poole: So far as the Shipping Act is concerned, yes. I think they take their chances under the antitrust laws.

Commissioner Hearn: Well, in that case, you draw the distinction between foreign commerce of the United States and section 15 here?

Mr. Poole: Yes.

Well, section 15 I think can only be read in reference to section 1 of the Act where it defines those carriers which are subject to the regulation of the Shipping Act. There section 1 makes it pretty clear that it is only those carriers which are in the foreign trade from or to ports in the United States or districts, territories, and possessions of the United States are those carriers in the foreign commerce which are regulated by the Shipping Act.

What I am saying is it has been held, and I think it is true, that the jurisdiction under the Shipping Act is more restrictive than the jurisdiction under the antitrust laws. That is why I objected to antitrust principles being dragged in by the heels, so to speak, to define the jurisdiction of the Commission under the Shipping Act. (JA 148)

the Commission's determination into a preclusive ruling on whether foreign commerce was restrained under Sherman Act standards.[19]

2. We turn therefore to the principal issue in the case: Whether the District Court was correct in its jurisdictional determination that the complaint made no allegation of restraint on United States foreign commerce. Seeking affirmance of that ruling, defendants urge that there can be no restraint of United States foreign commerce, and hence no Sherman Act violation, no matter how egregious the conduct under Sherman Act standards, unless there is restraint of, or substantial effect on, United States commodity imports or exports or transportation to or from the United States.

In our view plaintiffs, in participating in the market of supplying the service of transportation in United States-flag vessels, were engaged in foreign commerce of the United States. We have no doubt that the Sherman Act applies to the restraint alleged here, an attempt by American firms to deny another American firm access to a line of international shipping trade created by Congress for the general benefit of American shipping. We hereafter elaborate our reasons for these views.

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[19] In our view the judgment cannot be affirmed because of the doctrine of primary jurisdiction invoked by appellees. The Hearing Examiners' findings insofar as they are purely factual are not really contested. Insofar as they make judgment on matters like legal causality under antitrust standards, their significance is limited both because the Commission made no ruling on them, and in any event, they do not lie within the area of expertise which justifies deference to the agency's findings.

Furthermore, the purpose of the primary jurisdiction doctrine is to harmonize the application of antitrust and regulatory policies. The Commission held merely that it had no regulatory power with respect to this conspiracy, not that this was lawful behavior under the Act and consistent with public interest. Compare S.W.W., Inc. v. Air Transport Ass'n of America, 89 U.S. App. D.C. 273, 280, 191 F. 2d 658, 664 (1951), *cert. denied*, 343 U.S. 955 (1952).

3. We may usefully begin our analysis by considering defendants' rather guarded assertions that the carriage of foreign-owned goods between foreign ports in American vessels may not be "commerce with foreign nations" subject to constitutional regulation by Congress. Concededly defendants themselves are engaged in United States foreign commerce, because they carry United States exports and imports. Their actions clearly can be regulated by Congress. Their contention, however, is that the Sherman Act cannot be applicable unless United States foreign commerce itself is restrained.[20] Obviously if plain-

[20] Defendants' point rests on analogy from cases involving restraints in interstate commerce, holding the Sherman Act is applicable only where the target of the restraint is interstate commerce, *e.g.*, Lieberthal v. North Country Lanes, 332 F. 2d 269, 272 (2d Cir. 1964); Page v. Work, 290 F. 2d 323, 330 (9th Cir.), *cert. denied*, 368 U.S. 875 (1961); David Cabrera, Inc. v. Union de Choferes y Duenos, 256 F. Supp. 839, 843-44 (D. P.R. 1966).

Similarly the defendants urge that United States v. Yellow Cab Co., 332 U.S. 218, 230-32, 233 (1947) holds that the "commerce" affected by a restraint on transportation is determined by terminal points of the journey. In that case, the Supreme Court dismissed, for want of a restraint of interstate commerce, that portion of the Government's antitrust complaint that related to a monopoly of local taxicab service. However, the problem there is primarily whether the federal government, acting within the framework of a federal system, has power to deal with such local restraint. The issue turns, as it must under the Constitution, on whether the facts show an effect on interstate commerce. The disclaimer of interstate commerce does not constitute a withdrawal of American law, but an assessment that what is involved is a matter of local law rather than national law.

Where foreign commerce is involved, however, the issues are different. In a sense the question of interpretation may still be similar: Whether United States regulation is reasonable in light of the international, rather than intrastate, character of the trade. However, the problem is different for the courts because the question may properly be answered by reference to factors such as citizenship that are meaningful in an international setting yet not involved where the issue is whether local commerce or national interstate commerce is restrained. Furthermore, the courts have

tiffs were not engaged in United States foreign commerce in the constitutional sense, there could be no such restraint. We therefore consider whether plaintiffs engaged in United States foreign commerce.

Gibbons v. *Ogden* [21] makes clear that, as used in the Constitution, "commerce" is a very broad concept which includes navigation—not merely because of the relationship between shipping and the movement of goods,[22] most certainly commerce, but also because shipping itself is a form of gainful economic activity.[23] Were it not so, Chief Justice

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an obligation to follow Congressional will that is greater when the only reason for failure to do so is lack of harmony with principles of international law, than it is when the Congressional intention is counter to the Constitutional mandates reserving the regulation of local affairs to the states rather than to Congress. *Compare* Atlantic Cleaners & Dyers, Inc. v. United States, 286 U.S. 427, 434 (1932).

[21] 22 U.S. (9 Wheat.) 1 (1824).

[22] *Compare* United States v. South Eastern Underwriters Ass'n, 322 U.S. 533, 538 n. 7 (1944) where the Government, appealing a dismissal of an indictment, argued that even if insurance was not "commerce" a restraint in the insurance industry was a restraint on those industries which must buy fire insurance. Because of its broad reading of "commerce" the Court found it unnecessary to pass on such questions.

[23] See also Justice Story's construction of the word "trade" in the Coasting and Fishery Act of 1793, 1 Stat. 305, in *The Nymph*, 18 Fed. 506 (1834), quoted by the Supreme Court in United States v. National Ass'n of Real Estate Boards, 339 U.S. 485, 490-91 (1950):

> "The argument for the claimant insists, that 'trade' is here used in its most restrictive sense, and as equivalent to traffic in goods, or buying and selling in commerce or exchange. But I am clearly of the opinion that such is not the true sense of the word, as used in the 32d section. In the first place, the word 'trade' is often, and indeed generally, used in a broader sense, as equivalent to occupation, employment, or business, whether manual or mercantile. Wherever any occupation, employment or business is carried on for the purpose of profit, or gain, or a livelihood, not in the liberal arts or the learned professions, it is constantly called a trade."

Marshall wrote, "the government of the Union has no direct power over the subject, and can make no law prescribing what shall constitute American vessels, or requiring that they shall be navigated by American seamen." [24]

Gibbons v. *Ogden* unequivocally states that the constitutional language granting Congress power to regulate "commerce with foreign nations" authorizes Congressional enactment of laws regulating "every species of commercial intercourse between the United States and foreign nations." [24a] That much was "universally admitted" in 1824. Plainly, United States vessels engage in a "species of commercial intercourse" between the United States and foreign nations regardless of the ownership or national origin of the goods they carry.

One of the significant accounts in foreign commercial intercourse is the fact that certain maritime nations earn income for their balance of international payments by providing transportation services involving neither their ports nor their products. Examples readily suggest themselves: e.g., Norway, Greece, Great Britain. They are engaged, in terms that are readily and fully understood by practical businessmen as well as theoretical economists, in the "export" of shipping services. So too, when American vessels earn transportation income, whether by payments from foreigners or Americans, there is direct benefit to the economy of the United States. More American seamen are employed and there is more business for American-based service industries dependent on shipping—e.g., repair and insurance. The fact that American-flag vessels must carry American crews,[25] and are liable to penalty tax if they are repaired abroad,[26] and are available to the Government

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[24] 22 U.S. (9 Wheat.) at 190.

[24a] 22 U.S. (9 Wheat.) at 193.

[25] 46 U.S.C. § 672a(b) requires generally that 75% of the crew shall be United States citizens.

[26] 19 U.S.C. § 257.

in time of national emergency [27] provides a substantial and on-going nexus to the United States.

These are the kinds of beneficial consequences, apart from any interest of the vessel owner himself, that nations further in their public interest by protecting the trade aspirations of their citizens. That policy is particularly compelling where ships are concerned because of the need to maintain a strong merchant marine available in wartime regardless of its peacetime routes.

Substantiating our view that the sale of American flag shipping services to foreigners is itself a form of United States foreign trade, is the protection Congress accorded to that trade in section 14 of the Shipping Act of 1916. That section authorizes the Federal Martime Commission to bar foreign carriers from United States ports if they are parties to an agreement respecting transportation between foreign ports that excludes American-flag carriers from admission on equal terms.[28] And defendants appar-

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[27] 46 U.S.C. § 1242(a). The statute applies to all vessels owned by citizens of the United States.

[28] 46 U.S.C. § 813, providing in pertinent part:

> "The Federal Maritime Board upon its own initiative may, or upon complaint shall, after due notice to all parties in interest and hearing, determine whether any person, not a citizen of the United States and engaged in transportation by water of passengers or property—
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> * * *
>
> "(2) Is a party to any combination, agreement, or understanding, express or implied, that involves in respect to transportation of passengers or property between foreign ports, deferred rebates or any other unfair practice designated in section 812 of this title, and that excludes from admission upon equal terms with all other parties thereto, a common carrier by water which is a citizen of the United States and which has applied for such admission."

Any person who is a party to such an agreement is denied the right of entry to United States ports.

ently concede that the National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.*, passed by Congress under its commerce power, is applicable to all American-flag vessels.[29]

4. We hold that plaintiffs were engaged in the foreign commerce of the United States for purposes not only of determining constitutional power, but also of determining the applicability of the Sherman Act, which prohibits conspiracies "in restraint of trade or commerce among the several States or with foreign nations."

The basic approach to Sherman Act construction is the broad premise that Congress exercised therein the full scope of its powers under the Commerce clause of the Constitution.[30] That premise has been stated in cases involving interstate commerce, and may well be subject to limitations —for cause shown, so to speak—in regard to foreign com-

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[29] Defendants note that the Jones Act, 46 U.S.C. § 688, according a remedy to seamen injured in the course of their employment, is rooted in Congress's Article III admiralty power. As to the National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.*, defendants contend that this is mere application of the internationally recognized principle that for purposes of on-board conduct and regulation of the crew, ships are part of the territory of the flag nation. United States v. Flores, 289 U.S. 137 (1933). While it may be that the fiction justifies application of United States law to American vessels as a matter of international law, it by no means follows that this serves as the source of Congressional power under our constitutional law. The constitutional basis of the National Labor Relations Act is, pure and simple, the commerce power.

[30] *See*, United States v. Frankfort Distilleries, 324 U.S. 293, 298 (1945); United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 558 (1944); Atlantic Cleaners & Dyers v. United States, 286 U.S. 427, 435 (1932).

merce.[31] For example, it may fairly be inferred, in the absence of clear showing to the contrary, that Congress did

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[31] In United States v. Aluminum Co. of America, 148 F. 2d 416, 443 (2d Cir. 1945), Judge Learned Hand wrote: "Nevertheless, it is quite true that we are not to read general words, such as those in this Act, without regard to the limitations customarily observed by nations upon the exercise of their powers; limitations which generally correspond to those fixed by the 'Conflict of Laws.' We should not impute to Congress an intent to punish all whom its courts can catch, for conduct which has no consequences within the United States."

The International complications that have arisen concerning the application of United States antitrust laws to foreign commerce relate primarily to subjection of foreigners to United States laws for acts not done in the United States. *See, e.g.*, British Nylon Spinners, Ltd. v. Imperial Chemical Industries, Ltd., 2 All E.R. 780 (Ct. App. 1952). The theory on which this liability has proceeded is that "any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends; and these liabilities other states will ordinarily recognize." United States v. Aluminum Co. of America, *supra*, 148 F. 2d at 443. Conformance to international law is argued by analogy to the decision in The Case of the S.S. "Lotus" P.C.I.J. Ser. A. No. 10 (1927).

In the case at bar, however, no such international complications are present insofar as nationality is a recognized international basis for prescribing conduct, *cf.* Blackmer v. United States, 284 U.S. 421 (1932), and in any event the interests of foreign parties are insubstantial. Thus while we agree with defendants' arguments that considerations of comity are appropriate in construction of the antitrust laws, we think that here it is the Sherman Act's applicability, rather than inapplicability, that is supported by consideration of the "comity" factors—considerations similar to the factors appropriate in choice-of-law cases, see generally Cheatham & Reese, Choice of the Applicable Law, 52 Colum. L. Rev. 959 (1952).

not intend an application that would violate principles of international law.[32]

However, the broad statement that Congress has exercised the full sweep of its commerce powers is not without significance in determining whether the Sherman Act applies as to restraints that operate, in the constitutional sense, against the "foreign commerce" of the United States. The Sherman Act has aptly been characterized as a "charter of freedom."[33] Its principle of limiting the accumulation and exercise of dominant economic power[34] is rooted in historic notions of the invalidity of unreasonable trade restraints,[35] and that policy has been increasingly accepted as a fundamental principle of our system.[36] If, as defend-

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[32] *Compare* McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 21 (1963) *with* The Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) (Marshall, C.J.).

For a sampling of the dialogue concerning the legality under international standards of applications of the anti-trust laws of the United States to foreign nationals *see, e.g.*, Carlston, Antitrust Policy Abroad, 49 Nw. U.L. Rev. 713 (1955); Fugate, Antitrust Jurisdiction and Foreign Sovereignty, 49 U. Va. L. Rev. 925 (1963); Whitney, Sources of Conflict Between International Law and the Antitrust Laws, 63 Yale L.J. 655 (1954); Symposium, Extraterritorial Effect of the U.S. Antitrust Laws, A.B.A. Antitrust Law Section, Proceedings at the Annual Meeting 65 (1957); Hearings before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 89th Cong., 2d Sess. (1966).

[33] Appalachian Coals, Inc. v. United States, 288 U.S. 344, 359 (1933).

[34] See generally Bork, Bowman, Blake & Jones, The Goals of Antitrust: A Dialogue on Policy, 65 Colum. L. Rev. 422 (1965).

[35] Standard Oil Co. v. United States, 221 U.S. 1 (1911); United States v. Addyston Pipe & Steel Co., 85 Fed. 271 (6th Cir. 1898), *aff'd* 175 U.S. 211 (1899); Dewey, Common-Law Background of Antitrust Policy, 41 U. Va. L. Rev. 759 (1955).

[36] Antitrust principles are relevant even in those economic sectors subject to day-to-day supervision by federal regulatory agencies. FMC v. Aktiebolagat Svenska Amerika Linien, 390 U.S. 238

ants contend, that policy cannot extend to the full sweep of American foreign commerce because of the international complications involved, then surely the test which determines whether United States law is applicable must focus on the nexus between the parties and their practices and the United States, not on the mechanical circumstances of effect on commodity exports or imports.

The Sherman Act is not limited, in effect, to restraints on sales of goods. That is the thrust of defendants' distinction. In the domestic setting, however, it is settled that the Sherman Act's bar on unreasonable restraints on trade or commerce extends to service industries—and transportation is clearly a service industry[37]—as part of commerce.[38] There is no basis in the statute or in reason to argue that conspiracies in service industries are proscribed only if the services are in interstate commerce, and not if they are in foreign commerce.[39]

Defendants correctly point out that the cases hitherto applying the Sherman Act to foreign commerce have in fact

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(1968); United States v. El Paso Natural Gas Co., 376 U.S. 651 (1964); United States v. Radio Corp. of America, 358 U.S. 334, 351 (1959); Georgia v. Pennsylvania R. Co., 324 U.S. 439 (1945); City of Pittsburgh v. FPC, 99 U.S. App. D.C. 113, 237 F. 2d 741 (1956).

[37] United States v. Joint Traffic Ass'n, 171 U.S. 505 (1898); United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897).

[38] United States v. National Ass'n of Real Estate Boards, 339 U.S. 485 (1950); Atlantic Cleaners & Dyers v. United States, *supra* note 17; United States v. American Medical Ass'n, 72 U.S. App. D.C. 12, 110 F. 2d 703, *cert. denied*, 310 U.S. 644 (1940).

[39] With this case in a purely jurisdictional posture we need not consider the question, in many ways more difficult, whether in terms of ruling on the merits of the validity of actions taken, the Sherman Act standards of reasonableness developed for interstate commerce should be applicable with full force to foreign transactions, and whether that issue is still open in light of Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951).

involved either exports or imports of goods, or transportation to or from United States ports,[40] and conclude that it is inapplicable unless one or the other is present.[41] We recognize that ours is the first ruling on the issue before us—but if there has never before been a ruling affirming application of the Act to this kind of trade, neither has there been a ruling rejecting that application. The matter is *res nova*, and we must decide it in the light of the reasoning and analysis that appears to us to be sound.

It may be noted that in related contexts contentions close to those urged by defendants have not been accepted. A mechanical commodity export-import limitation was rejected by the District Court in *In re Grand Jury Investigation of the Shipping Industry*, 186 F.Supp. 298, 313 (D.D.C. 1960). Prior to that it had been rejected as unsound by the 1955 Report of the Attorney General's National Committee to Study the Antitrust Laws (p. 77-80). We reject it also.

It may be assumed that, as a matter of construing Congressional intent, the Sherman Act has no application where

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[40] *See, e.g.*, Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 704 (1962) (United States vanadium exports); Timken Roller Bearing Co. v. United States, *supra* note 39 (imports and exports of industrial bearings); United States v. Sisal Sales Corp., 274 U.S. 268 (1927) (United States sisal imports); United States v. Aluminum Company of America (ALCOA), 148 F. 2d 416 (2d Cir. 1945) exports and imports of aluminum ingot); United States v. Imperial Chemical Industries, 100 F. Supp. 504, 591-592 (S.D.N.Y. 1951) (exports and imports of explosive powder); United States v. General Electric Co., 82 F. Supp. 753, 891 (D.N.J. 1949) (exports and imports of incandescent lamps).

[41] Where the allegedly illegal restraint concerns commodities then, of course, the absence of an effect on United States exports or imports renders the Sherman Act inapplicable. *See, e.g.*, Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F. 2d 99, 105 (2d Cir. 1951) (price-fixing agreement "explicitly confined to Great Britain and Ireland" not violative of United States Antitrust laws).

the market involved consists of shipping services between two foreign ports, without any American characteristic, and the only American aspect is that one or some of the persons competing in the transportation market is offering American flag ships. In the case before us, however, we hold that, since there is an identifiable, distinctive market for American-flag shipping service where the American characteristic is dominant—a market defined as involving the transportation of AID-financed cargoes, which has a definite nexus with significant interests of the United States—the Sherman Act is applicable to a conspiracy to exclude newcomers from the trade.[42]

Our conclusion as to the existence of the requisite nexus is influenced by three salient considerations. First, the trade is entirely a product of the United States policy of subsidizing its merchant marine. It is the United States that has the greatest interest in this trade, and its conduct on a strong and efficient basis. Defendants claim that AID is merely a financier, yet the fact that the foreign importers were willing to accept the burden of higher-cost United States-flag shipping in order to get AID financing tends to show that AID was providing a stimulus to trade far beyond the realm of the conventional private financier. We may take note of what Judge Ryan found, on a more complete record, concerning the significance of AID and its programs. In *United States* v. *Concentrated Phosphate Export Ass'n* he wrote:

> We also do not accept or agree with defendant's argument that AID was but an incidental party to the trans-

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[42] *Compare* Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962); Branch v. FTC, 141 F. 2d 31 (7th Cir. 1944), both of which condemned, as illegal, conduct by American firms having an adverse effect on the international business opportunities of other American firms. See also the Webb-Pomerene Act, 15 U.S.C. §§ 61-65, conditioning antitrust immunity for export associations, in part, on the absence of restraint on the export trade of any domestic corporation.

> action—no more than the usual financing institution found in international transactions where there are problems of currency exchange. AID was at the center of the transactions, it was the force which initiated, directed, controlled and financed them. Without AID, there would have been no sale or purchase and the extent of the role it played was known in every detail to and relied on by both parties to the transactions, particularly by the supplier who looked to it for payment and obligated itself to conform to its requirements and conditions if he was to receive payment.[43]

Since the United States has established and promoted, in carriage of AID-financed movements, this trade of providing American-flag shipping service, it is only reasonable to expect the "fundamental national economic policy" of the antitrust laws to be applicable.[44] Clearly, the right of all American-flag ships to participate is basic. Had there been a conspiracy of *foreign* carriers to exclude American-flag ships from access to trade, the Federal Maritime Commission would have been directed to exclude them from United States ports.[45] Can it be supposed that Congress intended American competitors to be able to organize a similar conspiracy with total immunity for their conduct?

Secondly, all parties must be Americans to participate in serving this market for American-flag shipping. Consequently there are few possible international complications to justify an interpretation that deliberately cuts back on the scope of the antitrust laws as applied to commerce which greatly concerns the United States. It is plain that

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[43] 273 F. Supp. 263, 270-71 (S.D.N.Y. 1967) prob. juris noted, 390 U.S. 1001 (1968).

[44] Carnation Co. v. Pacific Westbound Conf., 383 U.S. 213, 218 (1966).

[45] *See* 46 U.S.C. § 813, quoted note 28, *supra*.

where American foreign commerce is affected foreigners may be held under our antitrust laws for restraints thereon.[46] It is also significant, for the purpose of determining whether what is involved constitutes activities affecting American foreign commerce within the scope of the antitrust laws that the trade not only has significant contacts and nexus with the United States but also is the province of American concerns.[47]

5. We now consider whether the foregoing analysis is to any extent aborted or negatived by defendants' contention that, whatever the case as to the application of the antitrust laws generally to foreign commerce not involving commodity exports, the Sherman Act must be read in conjunction with, and be limited by, the Shipping Act of 1916. Defendants thus switch from their prior position before

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[46] It is settled that the antitrust laws may apply to foreigners. *See, e.g.*, United States v. The Watchmakers of Switzerland Information Center, Inc., 133 F. Supp. 40, 134 F. Supp. 710 (S.D.N.Y. 1955), 168 F. Supp. 904 (S.D.N.Y. 1958).

Where restraints of commodity exports or imports are concerned, the test most used to determine whether the Sherman Act is applicable to acts done outside the United States is that formulated by Judge Learned Hand in United States v. Aluminum Co. of America, *supra* note 31, whether the agreement was intended to, and did, affect United States imports or exports. *See, e.g.*, United States v. Minnesota Mining & Mfg. Co., 92 F. Supp. 947 (D. Mass. 1950). The principal question is what is meant, in this context, by the word "intent" in light of the presumption that persons are presumed to intend the natural consequences of their actions.

The considerations outlined in this opinion of American contacts and nexus (see *supra*, p. 18) provide objective criteria that may usefully supplement such an "intent" test.

[47] In our case it is effectively the province of American operators, by law. It is significant that in the overwhelming bulk of the decided cases involving application of the antitrust laws to American commerce, the prohibited conspiracy was one in which American concerns played a significant role. *See, e.g.*, cases cited note 40, *supra*.

the Commission,[48] and now urge that the Commission's jurisdiction and the Sherman Act are coterminous. If the two acts are to be held to have similar coverage, it may well be because insofar as agreements of common carriers affecting foreign commerce are concerned, the Commission was in error in its narrow view of Shipping Act jurisdiction,[49] not because the Sherman Act is to be narrowed.

The Supreme Court has specifically held that the antitrust laws, which "represent a fundamental national economic policy," continue in effect as to the shipping industry, and their rate-making activities in foreign commerce. *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213 (1966). The Court recognized that the Shipping Act limits the scope of the antitrust laws, but this curtailment was confined to the "*explicit* provision exempting activities which are lawful under § 15 of the [Shipping] Act," and the Court declined to countenance any "*unstated* legislative purpose to free the shipping industry from the antitrust laws." See 383 U.S. at 216, 217. (Emphasis added) Therefore the antitrust laws continue in effect, without modification based merely on implication, as to common carriers, subject to the Act, which do not obtain the Commission approval under § 15 which Congress required as a condition of exemption. The antitrust laws also continue in effect as to areas not subject to the Shipping Act—e.g., a restraint engineered by one or more ocean tramps affecting American foreign commerce. The fact that the Shipping Act is limited by virtue of § 1, to those vessel operators who are "common carriers" certainly cannot be supposed to make an exemption available, say, to operators not common carriers, offering service of transporting commodities from the United States. That instance is not our case, of

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[48] See note 18, *supra*.

[49] See note 16, *supra*.

course, but it exemplifies that the two acts do not precisely mesh.[50]

In a more sophisticated contention, defendants say that the fact that the provision in § 15 providing an exemption from the antitrust laws was not made applicable to shipping between foreign ports is an indication of Congressional understanding that such shipping was not subject to the American antitrust laws. Indeed Congress contemplated in § 14 of the Act that American carriers would participate in foreign rate conferences governing shipping between foreign ports, and could hardly have supposed that they would be subject to the antitrust laws, or to more competition than governed shipping to and from the United States.

The dispositive analysis seems to us to run as follows: We are not to turn to the acts of subsequent Congresses for unstated exemptions, or implied repeals, of the antitrust laws. That is clear from *Carnation*.[51] Moreover, "how members of a later Congress may have interpreted the 1890 Act is not of weight for the purpose of construing the Sherman Act."[52]

The immunity granted by Congress in the Shipping Act was limited to those instances where there was some assurance, provided by Commission approval, that acts immunized from the antitrust laws were not contrary to the overall public interest. We have already expressed our

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[50] The Shipping Act does not eliminate all possibility of risks under the antitrust laws. *Compare* Ryan, J., in Sabre Shipping Corp. v. American Presidential Lines, — F. Supp. —, — (S.D.N.Y. 66 Civ. 3617) (1968).

[51] *See also*, United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 350 (1963); Pan American World Airways v. United States, 371 U.S. 296 (1963); California v. FPC, 369 U.S. 482 (1962); United States v. Borden Co., 308 U.S. 188, 201 (1939).

[52] United States v. Wise, 370 U.S. 405, 414 (1962).

doubt whether the Commission correctly disclaimed jurisdiction over the commerce before us. But assuming, for discussion, that the Commission was right, this is at most a *casus omissus*, and the antitrust exemption or limitation is not to be implied, but is to be furnished only when and as directed by the legislature, which has hitherto accompanied such directions with substitute provisions to safeguard the public interest.

Finally, we turn to defendants' argument that American participation in unapproved foreign conferences is contemplated by § 14 of the Shipping Act, and hence cannot reasonably be deemed governed by the antitrust laws. Such foreign conferences do not have the primary nexus of American contacts (*supra* point 5), which underlies our ruling that the activities before us constitute foreign commerce within the meaning of the Sherman Act.

Reversed and remanded.

APPENDIX B

Opinion and Order of the District Court for the District of Columbia

STATEMENT OF THE COURT AT THE CONCLUSION OF ORAL ARGUMENT ON JUNE 2, 1967

The Court: Gentlemen, I thank you very much for your very learned arguments.

I must say to you that prior to coming on the bench today I have had an opportunity over the past several days to review the pleadings very carefully and to review the briefs which have been filed.

I don't see any benefit that will arise from me taking the matter under advisement. I am prepared to rule at this time.

I am of the opinion that the complaint does not state facts constituting a cause of action under the Sherman Antitrust Act and, therefore, the Court is without jurisdiction and the motions to dismiss will be granted.

Does that dispose of the other motions as well?

Mr. Mallory: It does dispose of the other motions as well.

Mr. Sher: Yes.

The Court: Very well, thank you, gentlemen.

(Whereupon the hearing on the motions was concluded.)

(Filed June 9, 1967)

ORDER

Plaintiffs filed their complaint on November 18, 1966 alleging violations of Sections 1-3 of the Sherman Act, 15 U.S.C. §§ 1-3, by the named defendants.

As listed in paragraph 1 of the stipulation filed with the Court on May 10, 1967, defendants have filed motions contesting this Court's jurisdiction over the subject matter of the complaint.

Upon consideration of the legal memoranda of the parties, and of the oral arguments by counsel presented thereon on June 2, 1967, in accordance with paragraphs 1 and 2 of the aforesaid stipulation, it appears that this Court is without jurisdiction over the subject matter of this cause.

Accordingly, it is this 9th day of June, 1967:

ORDERED that the complaint be, and it hereby is, dismissed in its entirety.

It further appears that this Court's determination that it is without jurisdiction over the subject matter makes it unnecessary to consider any other motions pending in this cause as listed in paragraphs 3 and 6 of the aforesaid stipulation.

JOSEPH C. McGARRAGHY
Joseph C. McGarraghy
United States District Judge

Seen: .....
Attorney for Plaintiffs

APPENDIX C

Decision of the Federal Maritime Commission

REPORT

BY THE COMMISSION: (John Harllee, Chairman; James V. Day, Vice Chairman: George H. Hearn and John S. Patterson, Commissioners)

This is a complaint case before us on exceptions to the Initial Decision of the Examiner.

Complainant Pacific Seafarers, Inc. (PSI), alleges that respondents AGAFBO,[1] WCAFBO,[2] and AFBO,[3] together with their member lines, have unlawfully attempted to drive PSI out of the Taiwan-Thailand/South Vietnam trade. Complainant asserts that respondents (1) have violated section 15 of the Shipping Act (the Act) by operating pursuant to an agreement not filed with or approved by the Commission, (2) have violated section 18 of the Act (a) by not filing their concertedly established rates with the Commission, and (b) by maintaining rates that are so unreasonably low as to be detrimental to our commerce, and (3) have violated section 16 First of the Act by acting in a manner which is unduly prejudicial to complainant.

PSI operates a common carrier service with American flag vessels in the Taiwan-Thailand/South Vietnam trade. It does not offer a service between the United States or any of its Districts or Territories or possessions on the one hand and a foreign country on the other hand. The principal commodity that it carries is cement and it was these cement offerings which prompted the institution of

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[1] Atlantic and Gulf Coast American Flag Berth Operators.

[2] West Coast American Flag Berth Operators.

[3] American Flag Berth Operators.

complainant's service. In addition to its common carrier service, a PSI affiliate operates a charter or tramp service in the same trade, again catering to cement principally. The cargoes carried by PSI are entirely commercial in nature originating in one foreign port and destined to another foreign port. The shipping arrangements as well as the sales of the commodities are made between foreign principals. Although the U.S. Government through the Agency for International Development (AID) ultimately finances the sales—including the cost of water transportation—our Government in no way participates in the transactions. Indeed, but for the cargo preference laws which require, generally, that fifty percent of AID-financed cargoes move in American flag bottoms, American flag vessel participation in the movement might never have occurred. Further, the record is bereft of any evidence that the cement involved was cement transshipped from the United States.

AGAFBO is a conference of American Flag carriers which operates under approved Agreement No. 8086, WCAFBO operates under Agreement No. 8186. Parties to each of these agreements are permitted to act collectively in the negotiation of transportation rates and conditions of carriage respecting MSTS[4] cargoes (including related shipments) to and from U.S. ports and between foreign ports. Agreement No. 8750, an approved inter-conference agreement, permits meetings and discussions between AGAFBO and WCAFBO. None of these agreements permits the signatories to agree upon rates for either commercial or other government-sponsored cargoes in our foreign commerce or in the foreign commerce of other nations. AFBO, an association of American flag carriers organized in the early 195[illegible]'s, is composed of carriers who are members of either AGAFBO, WCAFBO, or both, although membership in neither AGAFBO, nor

[4] Military Sea Transportation Service.

WCAFBO, is a prerequisite to AFBO membership. AFBO purports to establish rates and conditions of carriage by its signatories between Taiwan/Japan and Thailand, Korea, Vietnam, the Phillippines, Okinawa and Cambodia. Its memoranda of agreed rates relate solely to commercial cargoes in these foreign interport trades. AFBO does not enjoy Commission approval under section 15 of the Act, nor are its tariffs filed with the Commission.[5]

Apart from the asserted violations of the Act, we are first confronted with the issue of jurisdiction. It is our judgment that the reach of the Act and, consequently our jurisdiction, does not extend to the matters complained of.

Admittedly, respondents entered into an agreement in the Taiwan-Thailand/South Vietnam trade and that agreement—AFBO—is the type which falls squarely within the purview of section 15. Parties to the AFBO agreement have not filed their agreement with the Commission and have effectuated it without the Commission's prior approval. If our jurisdiction encompassed this trade, a classic violation of section 15 would be established, harm *vel non* to complainant notwithstanding.

While it is true that section 15 requires that:

> "every common carrier by water . . . shall file . . . a copy . . . of every agreement with another such carrier."

the "common carrier by water" of section 15 is the entity defined in section 1:

> "The term 'common carrier by water' means a common carrier by water in foreign commerce or a common carrier by water in interstate commerce on the

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[5] PSI, likewise, has not filed with the Commission any schedule of rates in the Taiwan-Thailand/South Vietnam trade.

> high seas or the Great Lakes on regular routes from port to port."

And a common carrier in foreign commerce is defined as:

> ". . . a common carrier . . . engaged in the transportation by water of passengers or property between the United States or any of its Districts, Territories, or possessions and a foreign country, whether in the import or export trade . . . ."

Hence, the reading of section 15 which Congress obviously intended requires that every common carrier by water in interstate commerce and every common carrier engaged in the transportation by water of passengers or property between the United States or any of its Districts, Territories, or possessions and a foreign country file with the Commission for prior approval certain species of agreements with other such carriers.

The record in this case makes perfectly clear that the conduct complained of is and has been exercised by carriers in a trade or trades other than between "the United States or any of its Districts, Territories or possessions and a foreign country," and no matter how offensive or horrendous that conduct, it does not fall within the authority of this Commission. There is not a modicum of evidence that brings the gravamen of the complaint within the purview of the Act. Complainants have attempted to cross the jurisdiction barrier on two grounds.

First, we shall deal with the claim that since the cargoes, including the cost of transportation, were financed by AID what otherwise might have been commerce between two (or more) foreign nations was converted to the commerce of the United States. We have noted, in this regard, that the ocean transportation and the sales were arranged between foreign principals and that neither AID nor any other agency of our Government participated in any of the commercial or shipping transactions. AID's

concern began and ended with its role as financier.[6] The lending of funds by a government agency to finance wholly foreign transactions, including ocean freight, does not convert foreign-to-foreign commerce into the foreign commerce of the United States, any more than would the lending of such money by an American private financial institution.

Our view in this regard is not unlike that generally held with respect to our antitrust laws:

> ". . . (I)t is clear that the mere financing by Americans of manufacturing, mining, or other local activities abroad does not come within the Sherman Act." *Report of the Attorney General's National Committee to Study the Antitrust Laws (1955).*

In short, our jurisdiction cannot be expanded or contracted merely by the underlying financial arrangements of ocean shipping.[7]

Finally, PSI argues alternatively that (a) AFBO itself, is an agreement within the purview of section 15 and should have been filed and approved before its effectuation, or (b) it is part and parcel of AGAFBO and/or WCAFBO which, as a modification thereof, should have been filed and approved prior to implementation.

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[6] "A.I.D., itself, does not procure any commodities or make shipping arrangements. As a general rule, A.I.D. acts only in the capacity of a financing institution." Deposition of David E. Bell, AID Administrator, Exhibit 106.

[7] A second argument advanced by PSI is not dissimilar from its AID claim. Briefly, its thrust is that the *mere operation* of U.S. flag vessels constitutes a "part of the commerce of the United States." No authority is found to support this assertion. We have noted that PSI's operation has been wholly foreign. We believe such operation constitutes "other local activities abroad," *Attorney General's National Committee, supra.*

As the record establishes, AFBO is an organization of American flag vessels plying a trade totally within the confines of foreign Far Eastern ports. For the simple reason that the trade does not involve as one terminus any port in a State, District, Territory or possession of the United States, the carriers, within the AFBO context cannot be deemed to be engaged in the foreign commerce of the United States.

Complainant's alternative argument, although equally defective, is more engaging. In support of its proposition it points to the use of AGAFBO and WCAFBO offices (and officers) for the transaction of some of AFBO's business and cites predecents which indicate that our jurisdiction often involves foreign-to-foreign commerce.

As the Examiner noted, the use of the "physical organization or 'machinery' " of the two approved agreements by the AFBO group is immaterial to whether or not AFBO constitutes an agreement within the purview of section 15.

There is no relationship between AFBO on the one hand and AGAFBO and WCAFBO on the other hand, save an overlapping of memberships and some confusing of the organizations administering the agreements. But it is crystal clear that AGAFBO and WCAFBO do not encompass the foreign-to-foreign movement of commercial cargoes, whether or not financed or owned by our Government. Were AGAFBO and WCAFBO to agree on rates and conditions of cargo moving on *our* foreign commerce not specifically authorized by the approved agreements, a different result might have been reached.

The cases cited by complainant fall far short of aiding its theories. In *States Marine Lines, Inc.* v. *Trans-Pacific Freight Conf.*, 7 FMC 204 (1962), the Commission considered the legality of an approved neutral body provision

in the context of the filed and approved agreements. The particular transaction which triggered the proceeding, the movement of oranges from Japan to Canada, was entirely irrelevant. The real question in issue was whether conference was effectuating a neutral body provision compatible with the one which had been approved as a modification to its basic or organic agreement. Upon review, the court, in *Trans-Pacific Freight Conference of Japan* v. *FMC*, 314 F. 2d 277 (1963), addressed itself to the jurisdictional issue in foreign-to-foreign commerce and concluded that the neutral body's fines were assessed *not* "for any act or thing done in connection with the shipments from Japan to Canada." The court significantly brushed aside the Conference's contention of no jurisdiction with the statement:

> ". . . (W)e think that petitioners' assertion of lack of jurisdiction is without validity for a more fundamental reason. When the members of the conference chose to adopt their conference agreement and its various amendments, they deliberately elected to enter into a single unitary agreement 'to promote commerce from Japan, Korea and Okinawa to Hawaii and Pacific coast ports of the United States *and Canada.*'" (Emphasis ours.)

Further, *Oranje Line, et al.* v. *Anchor Line Limited*, 5 FMB 714 (1959), the Board noted that the trade between Canada and the United Kingdom was encompassed explicitly by the very terms of the agreement:

> "It is clear that in this case, where the agreements cover both the foreign commerce of the United States and also the intimately related foreign commerce of Canada our jurisdiction exists."

In the case before us, the subject matter of the AFBO agreement is not set forth in the AGAFBO and WCAFBO

agreements, nor is the subject matter "intimately related" to our foreign commerce.[8]

Since we have no jurisdiction in the premises, we shall not address ourselves to the other contentions raised by complainants. Accordingly,

IT IS ORDERED, That the complaint is hereby dismissed. By the Commission.

THOMAS LISI
Thomas Lisi
Secretary

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[8] Complainant has placed some reliance on *United States* v. *Anchor Line, Ltd.*, 232 F. Supp. 379 (1964). Involved in that case were agreements made abroad which directly related to the foreign commerce of the United States:

> "The vital principle to be applied in determining whether the United States courts have jurisdiction over foreign-flag carriers who fail to file contracts entered into abroad is whether the performance of those contracts or effectuation of those arrangements *operated in this country so as to affect our foreign commerce directly and materially.*" (Emphasis added.)

In the case at hand the AFBO agreement neither directly nor materially affected our foreign commerce.

APPENDIX D

Statutes Involved

Sherman Antitrust Act

Act of July 2, 1890, c. 647, § 1, 26 Stat. 209, 15 USC § 1:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Act of July 2, 1890, c. 647, § 2, 26 Stat. 209, 15 USC § 2:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Shipping Act of 1916

Act of September 7, 1916, c. 451, § 1, 39 Stat. 728, 46 USC § 801:

> When used in this chapter:
>
> The term "common carrier by water in foreign commerce" means a common carrier, except ferryboats running on regular routes, engaged in the transportation by water of passengers or property between the United States or any of its Districts, Territories, or possessions and a for-

eign country, whether in the import or export trade: *Provided,* That a cargo boat commonly called an ocean tramp shall not be deemed such "common carrier by water in foreign commerce."

The term "common carrier by water in interstate commerce" means a common carrier engaged in the transportation by water of passengers or property on the high seas or the Great Lakes on regular routes from port to port between one State, Territory, District, or possession of the United States and any other State, Territory, District, or possession of the United States, or between places in the same Territory, District, or possession.

The term "common carrier by water" means a common carrier by water in foreign commerce or a common carrier by water in interstate commerce on the high seas or the Great Lakes on regular routes from port to port.

The term "other person subject to this chapter" means any person not included in the term "common carrier by water," carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water.

The term "person" includes corporations, partnerships, and associations, existing under or authorized by the laws of the United States, or any State, Territory, District, or possession thereof, or of any foreign country.

The term "Vessel" includes all water craft and other artificial contrivances of whatever description and at whatever stage of construction, whether on the stocks or launched, which are used or are capable of being or are intended to be used as a means of transportation on water.

The term "documented under the laws of the United States", means "registered, enrolled, or licensed under the laws of the United States."

Act of September 7, 1916, c. 451, § 14a, as added June 5, 1920, c. 250, § 20, 41 Stat. 996, and amended, 46 USC § 813:

The Federal Maritime Board upon its own initiative may, or upon complaint shall, after due notice to all parties in interest and hearing, determine whether any person, not a citizen of the United States and engaged in transportation by water of passengers or property—

(1) Has violated any provision of section 812 of this title, or

(2) Is a party to any combination, agreement, or understanding, express or implied, that involves in respect to transportation of passengers or property between foreign ports, deferred rebates or any other unfair practice designated in section 812 of this title, and that excludes from admission upon equal terms with all other parties thereto, a common carrier by water which is a citizen of the United States and which has applied for such admission.

If the Board determines that any such person has violated any such provision or is a party to any such combination, agreement, or understanding, the Board shall thereupon certify such fact to the Commissioner of Customs. The Commissioner of Customs shall thereafter refuse such person the right of entry for any ship owned or operated by him or by any carrier directly or indirectly controlled by him, into any port of the United States, or any Territory, District, or possession thereof, until the Board certifies that the violation has ceased or such combination, agreement, or understanding has been terminated.

Act of September 7, 1916, c. 451, § 15, 39 Stat. 733, 46 USC § 814:

* * * * * * * * * *

Every common carrier by water, or other person subject to this chapter, shall file immediately with the Commission

a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this chapter, and shall approve all other agreements, modifications, or cancellations. No such agreement shall be approved, nor shall continued approval be permitted for any agreement (1) between carriers not members of the same conference or conferences of carriers serving different trades that would otherwise be naturally competitive, unless in the case of agreements between carriers, each carrier, or in the case of agreement between conferences, each conference, retains the right of independent action, or (2) in respect to any conference agreement, which fails to provide reasonable and equal terms and conditions for admission and readmission to conference membership of other

qualified carriers in the trade, or fails to provide that any member may withdraw from membership upon reasonable notice without penalty for such withdrawal.

The Commission shall disapprove any such agreement, after notice and hearing, on a finding of inadequate policing of the obligations under it, or of failure or refusal to adopt and maintain reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints.

Any agreement and any modification or cancellation of any agreement not approved, or disapproved, by the Commission shall be unlawful, and agreements, modifications, and cancellations shall be lawful only when and as long as approved by the Commission; before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation; except that tariff rates fares, and charges, and classifications, rules, and regulations explanatory thereof (including changes in special rates and charges covered by section 813a of this title which do not involve a change in the spread between such rates and charges and the rates and charges applicable to noncontract shippers) agreed upon by approved conferences, and changes and amendments thereto, if otherwise in accordance with law, shall be permitted to take effect without prior approval upon compliance with the publication and filing requirements of section 817(b) of this title and with the provisions of any regulations the Commission may adopt.

Every agreement, modification, or cancellation lawful under this section, or permitted under section 813a of this title, shall be excepted from the provisions of sections 1-11 and 15 of Title 15, and amendments and Acts supplementary thereto.

Whoever violates any provision of this section or of section 813a of this title shall be liable to a penalty of not more than $1,000 for each day such violation continues, to

be recovered by the United States in a civil action. *Provided, however,* That the penalty provisions of this section shall not apply to leases, licenses, assignments, or other agreements of similar character for the use of terminal property or facilities which were entered into before the date of enactment of this Act, and, if continued in effect beyond said date, submitted to the Federal Maritime Commission for approval prior to or within ninety days after the enactment of this Act, unless such leases, licenses, assignments, or other agreements for the use of terminal facilities are disapproved, modified, or canceled by the Commission and are continued in operation without regard to the Commission's action thereon. The Commission shall promptly approve, disapprove, cancel, or modify each such agreement in accordance with the provisions of this section.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 888

PACIFIC FAR EAST LINE, INC., ET AL., *Petitioners*,

v.

PACIFIC SEAFARERS, INC., ET AL., *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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INDEX

	Page
Opinion Below	1
Jurisdiction	1
Constitutional Provision, Statutes, and Regulations Involved	2
Question Presented	2
Statement of the Case	3
Argument	10
Conclusion	22
Appendix	23

CITATIONS

CASES:

American Construction Co. v. Jacksonville Railway, 148 U.S. 372	12
Atlantic Cleaners & Dyers v. United States, 286 U.S. 427	16
Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213	10, 19, 20
Chicago v. Atchison, Topeka & Santa F. R. Co., 357 U.S. 77	11
Collins v. Miller, 252 U.S. 364	11
Ercona Camera Corporation v. Brownell, 246 F. 2d 675 (C.A.D.C.)	10
Federal Trade Com. v. Cement Institute, 333 U.S. 683	22
Georgia v. Pennsylvania R. Co., 324 U.S. 439	20
Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1	15, 16
In re Grand Jury Investigation of the Shipping Industry, 186 F. Supp. 298 (D.D.C.)	17
Irving Nat. Bank v. Law, 10 F. 2d 721 (C.A. 2)	21
John Hancock Mut. Life Ins. Co. v. Kraft, 200 F. 2d 952 (C.A. 2)	10
Klor's, Inc. v. Broadway-Hale Stores, 359 U.S. 207	17
Moore v. Mead's Fine Bread Co., 348 U.S. 115	17
Pevely Dairy Co. v. United States, 178 F. 2d 363 (C.A. 8)	16

Page

Poller v. Columbia Broadcasting System, 368 U.S. 464 ..... 13, 14, 15
Pope v. Atlantic Coast Line R. Co., 345 U.S. 379 12
Radio Station WOW, Inc. v. Johnson, 326 U.S. 120 ..... 11, 12
Simpson v. Union Oil Co., 377 U.S. 13 17
United Shoe Machinery Corp. v. United States, 258 U.S. 451 22
United States v. Anchor Line, Ltd., 232 F. Supp. 379 (S.D.N.Y.) 21
United States v. Chrysler Corp., 180 F. 2d 557 (C.A. 9) 16
United States v. Concentrated Phosphate Export Ass'n., 273 F. Supp. 263 (S.D.N.Y.) 13, 14
United States v. Continental Oil Co., 377 U.S. 161 13
United States v. Florian, 312 U.S. 656 10
United States v. Frankfort Distilleries, 324 U.S. 293 ..... 16, 17
United States v. General Motors Corp., 323 U.S. 373 12
United States v. Minnesota Mining & Mfg. Co., 92 F. Supp. 947 (D. Mass.) 18
United States v. Phosphate Export Assn., — U.S. —, 21 L. ed. 2d 344 ..... 13, 14, 15, 18
United States v. South-Eastern Underwriters Assn., 322 U.S. 533 16
Utah Gas Pipelines Corp. v. El Paso Natural Gas Co., 233 F. Supp. 955 (D. Utah) 16
Vermilya-Brown Co. v. Connell, 335 U.S. 377 12
White Motor Company v. United States, 372 U.S. 253 ..... 13, 14, 15
Yates v. United States, 354 U.S. 298 21

CONSTITUTION AND STATUTES:

Constitution, Article I, Section 8, Clause 3 ..... 2, 23

Act of July 2, 1890, c. 647,

§ 1, 26 Stat. 209, 15 U.S.C. 1 ..... 2, 5, 23

§ 2, 26 Stat. 209, 15 U.S.C. 2 ..... 2, 5, 23

§ 3, 26 Stat. 209, 15 U.S.C. 3 ..... 2, 5, 23

Act of October 15, 1914, c. 323,

§ 4, 38 Stat. 731, 15 U.S.C. 15 ..... 2, 24

Page

Act of Aug. 26, 1954, c. 936, 68 Stat. 832, as amended, 46 U.S.C. 1241(b) 2, 4, 24

P.L. 87-195, Pt. 1, § 102, Sept. 4, 1961, 75 Stat. 424, 22 U.S.C. 2151 ..... 2, 26

Shipping Act of 1916, 39 Stat. 728, 46 U.S.C. 801 7

28 U.S.C. 1292(b) 10

Webb-Pomerene Act, 40 Stat. 517, 15 U.S.C. 62 13

MISCELLANEOUS:

AID Regulation 1, Section 201.6(N), 22 C.F.R. 201.6(N) 2, 4, 14, 15, 25

Report of the Attorney General's Committee to Study the Antitrust Laws 17

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---

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit, printed in Appendix A to the petition, pp. 1a-24a, is not yet officially reported.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

CONSTITUTIONAL PROVISION, STATUTES, AND REGULATIONS INVOLVED

The pertinent parts of the Constitution, statutes, and regulations involved, set forth in the Appendix hereto, are:

Constitution, Article I, Section 8, Clause 3

Act of July 2, 1890, c. 647,

§ 1, 26 Stat. 209, 15 U.S.C. 1
§ 2, 26 Stat. 209, 15 U.S.C. 2
§ 3, 26 Stat. 209, 15 U.S.C. 3

Act of October 15, 1914, c. 323, § 4, 38 Stat. 731, 15 U.S.C. 15

Act of Aug. 26, 1954, c. 936, 68 Stat. 832, as amended, 46 U.S.C. 1241(b)

P.L. 87-195, Pt. I, § 102, Sept. 4, 1961, 75 Stat. 424, 22 U.S.C. 2151

AID Regulation 1, Section 201.6(N), 22 C.F.R. 201.6(N)

QUESTION PRESENTED

Petitioners are United States-flag shipping lines engaged, as part of their commerce to and from the United States, in carrying foreign assistance cargoes between Taiwan, Thailand, and South Vietnam, the cost of which cargoes and the freight charges for which are paid for with Agency for International Development (AID) funds provided by the United States Government. Respondents are also United States-flag shipping lines which competed with petitioners in the carriage of such cargoes. By reason of the Cargo Preference Law, as implemented by AID policy, the

carriage of such cargoes was effectively reserved for, and limited to, American-flag shipping.

The question presented is whether, under those facts, the Sherman Act is applicable to a conspiracy among petitioners to drive respondents out of business.

STATEMENT OF THE CASE

The following are the pertinent facts, set forth in the complaint filed by respondents herein, which, as the court below held, "must be accepted as true for purposes of a motion to dismiss" (App. 3a).[1]

Respondents are American corporations which, at the times material to this case, were engaged in the ocean shipping business.[2] JA 6-7.[3] They operated United States-flag vessels manned by American crews. JA 12. Respondents' business operations were centered in New York, and their ships started from, and intermittently returned to, the United States for personnel and maintenance requirements. JA 12. In 1962 respondents entered into competition with petitioners for the carriage of AID cargo in the Far East, as more particularly hereinafter described. JA 12.

The corporate petitioners are common carriers by water engaged in the transportation of property to and from various ports in the United States and ports in other countries and between ports in other countries.

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[1] "App." references are to the Appendix to the Petition.

[2] With the exception of one of respondents which served as managing agency for the others. JA 7.

[3] References herein to JA are to the joint appendix as printed for the use of the court below.

JA 11. Ten of such petitioners[4] are engaged in the transportation of property to and from various ports in the United States and the Far East. JA 11. As part of their service between the United States and the Far East said petitioners pick up cargo at Far East ports and unload it at other Far East ports. JA 11. This traffic, sometimes referred to as the Far East interport trade, is an integral part of petitioners' service to and from the United States. JA 11. The rates for this Far East interport service were set by agreement of petitioners, issued and published under the name of AFBO,[5] an organization of which all such petitioners were members. JA 12. The rates established by this agreement were adhered to by petitioners in the carrying of Far East interport cargoes. JA 12. The AFBO rate agreement was neither submitted to nor approved by the Federal Maritime Commission. JA 12.

The Cargo Preference Law, Appendix, *infra,* p. 24, which has been made applicable to AID cargoes by that agency's Regulation 1, Appendix, *infra,* p. 25, requires that at least 50 per cent of such cargoes be transported in privately-owned United States-flag commercial vessels. App. 3a-4a. AID provides the funds for the transportation of the cargoes, as well as for the cargoes themselves. JA 12. As a matter of policy, AID pays the entire cost of transportation (instead of just the 50 per cent) where the cargo is transported on

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[4] Pacific Far East Line, Inc., States Marine Lines, Inc., American President Lines, Ltd., Waterman Steamship Corporation, American Export Isbrandtsen Lines, Inc., American Mail Line, Ltd., States Steamship Company, United States Lines Company, and Lykes Bros. Steamship Co., Inc.

[5] American-Flag Berth Operators.

United States-flag commercial vessels. JA 147. The practical effect of this policy has been to reserve the carriage of AID cargoes for American shipping and to eliminate foreign competition therefrom. JA 11-12.

From the time that respondents entered into competition with petitioners in the Far East interport trade petitioners, for the purpose of eliminating respondents from such trade, engaged in a combination and conspiracy in restraint of trade and commerce and to monopolize trade and commerce in violation of sections 1, 2, and 3 of the Sherman Act, 15 U.S.C. 1, 2, and 3. JA 13. Petitioners sought to monopolize the Far East interport portion of their trade for the benefit of those petitioners who engaged in such trade (JA 13), to eliminate from such trade all competition from others, particularly the respondents (JA 13), and to obtain for such petitioners the highest possible amount of AID funds through the perpetuation and maintenance of the AFBO rate-fixing agreement. JA 13.

Petitioners' first effort to eliminate respondents' competition was to seek issuance of a directive from AID limiting AID shipping in the area to "conference liners." That would have eliminated respondents' vessels, but this effort of petitioners was not successful. JA 13-14.

Petitioners then successfully urged the Director General of Commerce of South Vietnam to issue a ruling to South Vietnamese importers requiring that all future AID shipments of cement be shipped on liners operated by AFBO members. Respondents were not then members of AFBO, but AID effectively countermanded that directive. JA 14.

Next, respondent Pacific Seafarers, Inc. (PSI) was told by the Director General that it would have to become a member of petitioner WCAFBO [6] if it wished to continue in the South Vietnam cement business. JA 14-15. When respondent PSI tried to comply, its application for membership was blocked because it had no Military Sea Transportation Service (MSTS) contract with the Defense Department, as did other WCAFBO members. When respondent sought such an eligibility contract, seven of petitioners tried to block it by protesting to the Defense Department. That too was unsuccessful. JA 15.

Finally, for the purpose of driving respondents out of business, the petitioners who were AFBO members agreed to "open" the rates on cement and fertilizer, the two commodities essential to the continuance of respondents' service, while maintaining petitioners' agreed upon rates on other products and commodities. JA 15. This rate "opening" was followed by reductions in the rate on cement from Taiwan to South Vietnam from $8.95 to $4.96 per long ton. The reduced rates were so unreasonably low as to insure that respondents could not continue to carry cement and fertilizer without incurring substantial losses. JA 16.

The "opening" of rates had its intended effect. Respondents were shortly driven out of business. JA 16. Thereafter, petitioners raised the rates, and indeed raised them to substantially higher levels than those prevailing prior to the "opening". JA 16.

In April 1963 respondent PSI filed a complaint with the Federal Maritime Commission charging that cer-

[6] West Coast American-Flag Berth Operators.

tain of petitioners' acts complained of in this action violated section 15 of the Shipping Act of 1916, 39 Stat. 733, 46 U.S.C. 814, App. 3d. JA 38. Following hearings, a hearing examiner's initial decision, and exceptions thereto, the Commission issued its decision (JA 111-120). The Commission found that the Far East interport trade "does not involve as one terminus any port in a State, District, Territory or possession of the United States" (JA 117); that therefore "the carriers, within the AFBO context cannot be deemed to be engaged in the foreign commerce of the United States" (JA 117) for the reason that the Shipping Act defines "a common carrier in foreign commerce" as one which is "engaged in the transportation by water of passengers or property between the United States * * * and a foreign country" (§ 1, 39 Stat. 728, 46 U.S.C. 801, App. 1d; JA 115-116); and that therefore "the reach of the [Shipping] Act and, consequently [the Commission's] jurisdiction, does not extend to the matters complained of." JA 115. The Commission accordingly dismissed the PSI complaint for want of jurisdiction. JA 120.

On November 18, 1966, respondents filed their complaint in this action in the United States District Court for the District of Columbia charging petitioners with violations of the Sherman Act as set forth above. JA 4-18. The complaint alleges, in addition to the allegations detailed above, that the services, organization, and personnel of petitioners AGAFBO[7] and WCAFBO were used to effectuate the combination and conspiracy described, that all the corporate petitioners are members of either AGAFBO or WCAFBO or both, and

[7] Atlantic and Gulf American-Flag Berth Operators.

that all the corporate petitioners consented to and acquiesced in the use of the services, organization, and personnel of AGAFBO and WCAFBO for such purposes and thereby participated in and contributed to the effectuation of the conspiracy. JA 16.

Three petitioners answered the complaint. JA 19-25, 29-33, 120-27. Others filed various motions. There were motions to dismiss on the ground that the district court was without jurisdiction over the subject matter (JA 33-34, 36-37), and motions for summary judgment on the same ground, which were treated by the parties, as well as by the district court, as the equivalent of motions to dismiss.

Following oral argument, the district court ruled from the bench

> "that the complaint does not state facts constituting a cause of action under the Sherman Antitrust Act and, therefore, the Court is without jurisdiction and the motions to dismiss will be granted." JA 167.

On June 9, 1967, the court dismissed the complaint in its entirety on the ground that the court was "without jurisdiction over the subject matter." JA 168.

On appeal, the court below (McGowan, Tamm, and Leventhal, Circuit Judges) reversed the judgment of the district court and remanded the case.

The court below, in an opinion by Judge Leventhal speaking for a unanimous court, was clear that respondents were engaged in the foreign commerce of the United States not only in the constitutional sense, but also "for purposes * * * of determining the applicability of the Sherman Act, which prohibits conspiracies

'in restraint of trade or commerce among the several States or with foreign nations.'" (App. 14a) "We have no doubt", Judge Leventhal wrote, "that the Sherman Act applies to the restraint alleged here, an attempt by American firms to deny another American firm access to a line of international shipping trade created by Congress for the general benefit of American shipping." App. 9a. The court held that

> "since there is an identifiable, distinctive market for American-flag shipping service where the American characteristic is dominant—a market defined as involving the transportation of AID-financed cargoes, which has a definite nexus with significant interests of the United States—the Sherman Act is applicable to a conspiracy to exclude newcomers from the trade." App. 19a.

The court found that

> "Since the United States has established and promoted, in carriage of AID-financed movements, this trade of providing American-flag shipping service, it is only reasonable to expect the 'fundamental national economic policy' of the antitrust laws to be applicable" (App. 20a)

and that

> "It is also significant, for the purpose of determining whether what is involved constitutes activities affecting American foreign commerce within the scope of the antitrust laws that the trade not only has significant contacts and nexus with the United States but also is the province of American concerns." App. 21a.

The court below rejected petitioners' contention that the Sherman Act was to be read as limited by the

Shipping Act (App. 21a-24a), pointing out that this Court, in *Carnation Co.* v. *Pacific Westbound Conference,* 383 U.S. 213, 217, had "declined to countenance any '*unstated* legislative purpose to free the shipping industry from the antitrust laws.'" App. 22a. The court also rejected the argument of petitioners that collateral estoppel precluded "relitigation" by respondents of the Maritime Commission's determination that the Far East interport trade was not part of the foreign commerce of the United States, as that determination rested not on Sherman Act standards, but solely on the standards and definitions of the Shipping Act. App. 6a-7a.

ARGUMENT

The case does not warrant review. The decision of the court below is correct. There is no conflict of decisions. Moreover, since the effect of the decision below was to deny petitioners' motions to dismiss and remand the case to the district court for trial, for this Court to exercise its certiorari jurisdiction to review the case at this time would be premature. We shall treat of this first.

1. In its present posture this case is not ripe for review by this Court on certiorari. The effect of the judgment below, which reversed the district court's dismissal of the action on petitioners' motions to dismiss, is to return the case to the district court in the same posture it would have had if the district court had denied petitioners' motions to dismiss. Such a denial, without more (cf. 28 U.S.C. 1292(b)), would not have been appealable. *United States* v. *Florian,* 312 U.S. 656; *Ercona Camera Corporation* v. *Brownell,* 246 F. 2d 675 (C.A.D.C.); *John Hancock Mut. Life Ins.*

Co. v. *Kraft*, 200 F. 2d 952 (C.A. 2). On remand to the district court, the case will proceed through usual pretrial discovery and on to trial. Whether all or some of the petitioners will emerge victorious, whether all or some of the respondents will be awarded damages and, if so, how much—these are questions that must await the outcome of the trial. Some or all of the numerous parties may prosecute further appeals to the court of appeals, and there may even be a further petition for certiorari filed.

As stated in *Radio Station WOW, Inc.* v. *Johnson*, 326 U.S. 120, 123-24:

> "Since its establishment, it has been a marked characteristic of the Federal judicial system not to permit an appeal until a litigation has been concluded in the court of first instance. [Citing cases] This requirement has the support of considerations generally applicable to good judicial administration. It avoids the mischief of economic waste and of delayed justice. *Only in very few situations, where intermediate rulings may carry serious public consequences, has there been a departure from this requirement of finality for Federal appellate jurisdiction.*" (Emphasis supplied)

"Good judicial administration" requires that a judgment of which review is sought "should be final not only as to all the parties, but as to the whole subject-matter" (see *Collins* v. *Miller*, 252 U.S. 364, 370) rather than as to merely a liminal matter as here.

This case is unlike *Chicago* v. *Atchison, Topeka & Santa F. R. Co.*, 357 U.S. 77, cited by petitioners, where "By its decision the Court of Appeals resolved all disputed questions between the parties * * * all that remained for the District Court on remand was to for-

mally enter judgment for the plaintiff" (357 U.S. at 83), and where, indeed, the Court implied that if all disputed questions had not been resolved and if more had "remain[ed] to be done but the mechanical entry of judgment by the trial court" (see *Pope* v. *Atlantic Coast Line R. Co.*, 345 U.S. 379, 382), review by this Court would have been regarded as premature.

No extraordinary inconvenience or embarrassment in the further conduct of this cause (see *American Construction Co.* v. *Jacksonville Railway*, 148 U.S. 372, 384) has been shown, nor can it be, by petitioners. Nor does the ruling below carry the "serious public consequences" warranting a departure from this Court's usual requirement of finality before it exercises its jurisdiction. See the *WOW* case, *supra*.[8] Nor are there here present other factors impelling this Court's review of an interlocutory order, such as a conflict among the Federal courts as to the meaning of a constitutional provision,[9] the resolution of which "is fundamental to the further conduct of the case." See *United States* v. *General Motors Corp.*, 323 U.S. 373, 377. In these circumstances, even were there any factors in this case indicating review on certiorari, the Court should exercise its discretion so as to avoid fragmented, piecemeal review of this litigation.

2. Petitioners, by seeking review on certiorari at this stage of the litigation, are in effect seeking to reinstate

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[8] Cf. *Vermilya-Brown Co.* v. *Connell*, 335 U.S. 377, involving the applicability of the Fair Labor Standards Act to employees on naval and air bases leased to the United States under executive agreements with foreign governments.

[9] The only conflict asserted by petitioners, discussed *infra*, p. 14, is of a much lower order and, indeed, resolves itself to being one of fact.

the dismissal of the complaint by the district court on motion. This runs counter to the principle enunciated in *Poller* v. *Columbia Broadcasting System,* 368 U.S. 464, 473:

> "We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot."

See also *United States* v. *Continental Oil Co.,* 377 U.S. 161; *The White Motor Company* v. *United States,* 372 U.S. 253, 264. If summary procedures are inappropriate in cases like *Poller* and *White Motor,* they are even less appropriate to the disposition of basic jurisdictional questions under the Commerce Clause and the Sherman Act. The relationship of the Far East interport trade to the overall activities of the parties, the impact of petitioners' activities on the United States and its foreign commerce, the extent of AID involvement and control—all bear on the question of Sherman Act jurisdiction, and call for trial rather than summary disposition.

The question of AID involvement and control furnishes a good example. In *United States* v. *Phosphate Export Assn.,* — U.S. —, 21 L. ed. 2d 344, the question was whether certain AID-financed transactions with the Republic of Korea were exports within the meaning of the Webb-Pomerene Act, 40 Stat. 517, 15 U.S.C. 62. In that case too, as here, the defendants argued "that AID was but an incidental party to the transaction—no more than the usual financing institution" (see *United States* v. *Concentrated Phosphate Export Ass'n,* 273 F. Supp. 263, 270 (S.D.N.Y.)), an

argument accepted by neither the district court nor this Court. After examining the nature of the transactions and the AID relationship thereto, as elucidated in "a more complete record" (App. 19a) and detailed findings by the district court, this Court held:

> "We must look at the economic reality of the relevant transactions. Here, although the fertilizer shipments were consigned to Korea and although in most cases Korea formally let the contracts, American participation was the overwhelmingly dominant feature. The burden of noncompetitive pricing fell not on any foreign purchaser, but on the American taxpayer. The United States was, in essence, furnishing fertilizer to Korea. AID selected the commodity, determined the amount to be purchased, controlled the contracting process, and paid the bill. The foreign elements in the transaction were, by comparison, insignificant. It stretches neither the language nor the purpose of the Act to determine that such a sale is not an 'export'." 21 L. ed. 2d at 351-52.

Now petitioners would have this Court believe that there is a conflict between the decision below and this Court's decision in *Phosphate*. But the "conflicts" petitioners point to (Pet. 15) are purely factual. They assert that there are factual differences between the AID relationship to the fertilizer shipments to Korea in *Phosphate* and the AID relationship to the cement and fertilizer shipments to Vietnam in the instant case. But it was for the resolution of such matters as these asserted differences that this Court called for trials, as distinguished from summary disposition, in *Poller* and *White Motor*. Just as the AID Regulation 1 involved in the *Phosphate* case (see *United States* v. *Concentrated Phosphate Export Ass'n*, 273 F. Supp.

263, 269-70 (S.D.N.Y.)) is the same as the AID Regulation 1 in the instant case (see JA 146), development herein of a full record would show that in terms of "the economic reality of the relevant transactions" (21 L. ed. 2d at 351) there are no differences of substance between this case and the *Phosphate* case. See JA 13-14. Thus, under *Poller* and *White Motor,* the "factual polarization" asserted by petitioners (Pet. 16) between this case and *Phosphate* militates not for granting the petition, but for denying it so that the trial that those cases call for can be had.

3. The court below was clearly correct in its holding (App. 9a) that

> "plaintiffs, in participating in the market of supplying the service of transportation in United States-flag vessels, were engaged in foreign commerce of the United States. We have no doubt that the Sherman Act applies to the restraint alleged here, an attempt by American firms to deny another American firm access to a line of international shipping trade created by Congress for the general benefit of American shipping."

The broad constitutional concept of "commerce", which includes navigation, was expounded in *Gibbons* v. *Ogden,* 22 U.S. (9 Wheat.) 1. There the Court held that the commerce power "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution." 22 U.S. (9 Wheat.) at 196. As stated by the court below (App. 12a):

> "*Gibbons* v. *Ogden* unequivocally states that the constitutional language granting Congress power to regulate 'commerce with foreign nations' authorizes Congressional enactment of laws regulat-

ing 'every species of commercial intercourse between the United States and foreign nations'." [10]

The Sherman Act is a law regulating "commercial intercourse"; and its reach is as extensive as that of the Congress under the Commerce Clause. In enacting the Sherman Act, Congress went "to the utmost extent of its constitutional power"; it "left no area of its constitutional power unoccupied." *United States* v. *South-Eastern Underwriters Assn.*, 322 U.S. 533, 558; *United States* v. *Frankfort Distilleries*, 324 U.S. 293, 298; *Atlantic Cleaners & Dyers* v. *United States*, 286 U.S. 427, 435; *United States* v. *Chrysler Corp.*, 180 F. 2d 557, 559 (C.A. 9); *Pevely Dairy Co.* v. *United States*, 178 F. 2d 363, 366 (C.A. 8); *Utah Gas Pipelines Corp.* v. *El Paso Natural Gas Co.*, 233 F. Supp. 955, 961 (D. Utah).

Petitioners' argument (Pet. 9) that there is no Sherman Act jurisdiction "where there is no substantial effect on United States imports and exports or transportation between the United States and foreign ports", is without merit. Even were there merit to the proposition thus stated, the petitioners' factual predicate has no foundation. At a trial the respondents could show the substantial effect of their interport trade on United States imports and exports carried by others, and the similar effect on transportation between the United States and foreign ports. Respondents also could show the effect that driving them out of business has had on the import-export trade and on transportation between the United States and foreign ports. More importantly, however, as the Court below held, "The Sherman Act is not limited, in effect, to restraints on sales of goods. * * * In the domestic set-

[10] 22 U.S. (9 Wheat.) at 193.

ting * * * it is settled that the Sherman Act's bar on unreasonable restraints on trade or commerce extends to service industries—and transportation is clearly a service industry—as part of commerce. There is no basis in the statute or in reason to argue that conspiracies in service industries are proscribed only if the services are in interstate commerce, and not if they are in foreign commerce." (App. 17a)[11]

The court below, while terming *"res nova"* the question whether foreign commerce applications of the Sherman Act must always involve either exports or imports of goods or transportation to or from United States ports (App. 18a), recognized that there is nothing novel in the principles which govern. The opinion below points out that (App. 18a-19a):

> "It may be noted that in related contexts contentions close to those urged by [petitioners] have not been accepted. A mechanical commodity export-import limitation was rejected by the District Court in *In re Grand Jury Investigation of the Shipping Industry,* 186 F. Supp. 298, 313 (D.D.C. 1960). Prior to that it had been rejected as unsound by the 1955 Report of the Attorney General's National Committee to Study the Antitrust Laws (pp. 77-80). We reject it also.

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[11] The Court below rested its decision on its determination that respondents' activities as alleged in the complaint (JA 6-7, 12-17) were such that respondents themselves were engaged in United States foreign commerce. But even were this not so, Sherman Act jurisdiction is present here. Petitioners are admittedly engaged in foreign commerce, of which the Far East interport trade is an integral part (JA 11). A combination and conspiracy among those engaged in interstate or foreign commerce, such as petitioners, to injure competitors, such as respondents, violates the Sherman Act whether or not the victims of the conspiracy are engaged in interstate or foreign commerce. *United States* v. *Frankfort Distilleries,* 324 U.S. 293, 298; *Moore* v. *Mead's Fine Bread Co.,* 348 U.S. 115, 119; *Klor's, Inc.* v. *Broadway-Hale Stores,* 359 U.S. 207, 213; *Simpson* v. *Union Oil Co.,* 377 U.S. 13, 16.

> "It may be assumed that, as a matter of construing Congressional intent, the Sherman Act has no application where the market involved consists of shipping services between two foreign ports, without any American characteristic, and the only American aspect is that one or some of the persons competing in the transportation market is offering American flag ships. *In the case before us, however,* we hold that, *since there is an identifiable, distinctive market for American-flag shipping service where the American characteristic is dominant—a market defined as involving the transportation of AID-financed cargoes, which has a definite nexus with significant interests of the United States—the Sherman Act is applicable to a conspiracy to exclude newcomers from the trade.*" (Emphasis supplied)

This holding is buttressed by the fact that the interport "trade is entirely a product of the United States policy of subsidizing its merchant marine" (App. 19a) and by the impact of AID direction, control, and financing of the interport shipments, and the court below so held. Since then, this Court, in *United States* v. *Phosphate Export Assn., supra,* has held that Congress did not mean "to insulate transactions initiated, controlled, and financed by the American Government, just because a foreign government is the nominal 'purchaser'." 21 L. ed. 2d at 351. Nor are such transactions insulated just because actual shipments take place between one foreign country and another, rather than between the United States and a foreign country. *United States* v. *Minnesota Mining & Mfg Co.,* 92 F. Supp. 947, 961, 963 (D. Mass.).[12]

The "whole mass of potential conflicts" with foreign governments that alarm petitioners (Pet. 10) are

[12] Petitioners' quotation from this case (Pet. 10) is out of context.

simply non-existent. The court below correctly answered that "all parties must be Americans to participate in serving this [AID] market for American-flag shipping. Consequently there are few possible international complications to justify an interpretation that deliberately cuts back on the scope of the antitrust laws as applied to commerce which greatly concerns the United States. It is plain that where American foreign commerce is affected foreigners may be held under our antitrust laws for restraints thereon. It is also significant, for the purpose of determining whether what is involved constitutes activities affecting American foreign commerce within the scope of the antitrust laws that the trade not only has significant contacts and nexus with the United States but also is the province of American concerns." App. 20a-21a.

Petitioners' argument that Sherman Act jurisdiction will undercut the regulation of American carriers under section 15 of the Shipping Act is answered by *Carnation Co.* v. *Pacific Westbound Conference,* 383 U.S. 213, which held (1) that it had long been recognized that the antitrust laws represent a fundamental national economic policy from which no industry is exempted absent specific congressional requirements to that effect, (2) that the Shipping Act did not repeal all antitrust regulation of the industry but gave it only limited exemption from the antitrust laws, and (3) that agreements among shipping lines that had *not* been subjected to examination by, and had *not* received the approval of, the Maritime Commission were subject to the antitrust laws. As the agreements in *Carnation,* just as the AFBO agreement in this case (JA 12), had *not* been approved by the Maritime Commission, they were held violative of the Sherman Act.

4. The decision below was correct in rejecting petitioners' arguments based upon asserted applicability of the doctrines of primary jurisdiction and collateral estoppel.

Petitioners argue that "Primary jurisdiction requires that antitrust actions in regulated industries be stayed pending the type of administrative proceeding *which has already occurred in this case*" and that "it is of critical importance that agency fact findings on contested, relevant issues *in areas of agency expertise* be given the fullest respect in subsequent judicial proceedings between the same parties." Pet. 16-17. The emphasis in the preceding quotations from the petition is ours, and the emphasized portions would seem to us to be the complete answer to petitioners' argument. Respondents have here done all that the primary jurisdiction rule requires, i.e., they sought relief from the Maritime Commission before going to court. The Commission, whose area of expertise is defined and confined by the Shipping Act, found "that the reach of the [Shipping] Act and, consequently our jurisdiction, does not extend to the matters complained of" (JA 115) for "the simple reason that the trade does not involve as one terminus any port in * * * the United States." JA 117. The Commission having exercised its expertise to determine that the relief sought was not subject to its jurisdiction, jurisdiction remained in the courts to grant appropriate relief—specifically, relief under the antitrust laws. *Georgia* v. *Pennsylvania R. Co.*, 324 U.S. 439; *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213, 224.

Petitioners incorrectly asserted (Pet. 18) that "the Commission *found as a fact* * * * that even under Sherman Act principles the allegedly unlawful activities

'neither directly nor materially affected our foreign commerce.' (p. 9c (*sic*) *infra*)." The portion of the Commission's decision thus quoted by petitioners (App. 8c) can mean no more than that petitioners' unlawful activities "neither directly nor materially affected our foreign commerce" *within the meaning of the Shipping Act.* This is clear not only from the Commission's decision as a whole, which is concerned in its entirety with "the reach of the [Shipping] Act and, consequently our jurisdiction" (App. 3c), but also from the context of the very note from which petitioners quote, which is concerned with *United States* v. *Anchor Line, Ltd.,* 232 F. Supp. 379 (S.D.N.Y.), a Shipping Act case.

Moreover, contrary to their emphatic assertion, petitioners' quotation is not of a finding of fact at all, but a conclusion of law—at best, from petitioners' standpoint, a mixed determination of law and fact. And the doctrine of collateral estoppel "makes conclusive in subsequent proceedings *only determinations* of fact, and mixed fact and law, *that were essential to the decision.*" *Yates* v. *United States,* 354 U.S. 298, 336 (emphasis supplied; partially quoted out of context by petitioners, Pet. 18-19); *Irving Nat. Bank* v. *Law,* 10 F. 2d 721, 724 (C.A. 2). "All this," as Judge Learned Hand said in the *Irving Bank* case, "is very old law." The complaint filed with the Maritime Commission charged Shipping Act violations (JA 45-49) and sought Shipping Act relief. JA 49-50. The Commission determined it lacked Shipping Act jurisdiction. JA 115-20. No legal/factual determinations under the Sherman Act were essential to that decision. As stated by the court below (App. 8a), "The Commission did not rule that there was no 'foreign commerce'

as that term is used in the Sherman Act, nor did it rule that the standards under the two acts were the same." This was entirely outside the scope of its inquiry. Thus there is no more collateral estoppel here than there was in *United Shoe Machinery Corp.* v. *United States*, 258 U.S. 451 (attack on machinery leases made in prior litigation brought under the Sherman Act held no estoppel of litigation under Clayton Act involving same leases—"The Sherman Act and the Clayton Act provide different tests of liability." 258 U.S. at 459) or in *Federal Trade Com.* v. *Cement Institute*, 333 U.S. 683 (*Old Cement* litigation brought under the Sherman Act held no estoppel of litigation under the Federal Trade Commission Act—"conduct * * * which falls short of being a Sherman Act violation may as a matter of law constitute an 'unfair method of competition' prohibited by the Trade Commission Act." 333 U.S. at 708).

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

Article I, Section 8, Clause 3 of the Constitution of the United States:

> The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

Act of July 2, 1890, c. 647, § 1, 26 Stat. 209, 15 USC § 1:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Act of July 2, 1890, c. 647, § 2, 26 Stat. 209, 15 USC § 2:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Act of July 2, 1890, c. 647, § 3, 26 Stat. 209, 15 USC § 3:

> Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is declared illegal.

Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Act of October 15, 1914, c. 323, § 4, 38 Stat. 731, 15 USC § 15:

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Act of Aug. 26, 1954, c. 936, 68 Stat. 832, as amended, 46 USC § 1241(b):

(b) Whenever the United States shall procure, contract for, or otherwise obtain for its own account, or shall furnish to or for the account of any foreign nation without provision for reimbursement, any equipment, materials, or commodities, within or without the United States, or shall advance funds or credits or guarantee the convertibility of foreign currencies in connection with the furnishing of such equipment, materials, or commodities, the appropriate agency or agencies shall take such steps as may be necessary and practicable to assure that at least 50 per centum of the gross tonnage of such equipment, materials, or commodities (computed separately for dry bulk carriers, dry cargo liners, and tankers), which may be transported on ocean vessels shall be transported on privately owned United States-flag commercial vessels, to the extent such vessels are available at fair and reasonable rates for United States-flag commercial vessels, in such manner as will insure a fair and reasonable participation of United States-flag commercial vessels in such cargoes by geographic areas: Provided, That

the provisions of this subsection may be waived whenever the Congress by concurrent resolution or otherwise, or the President of the United States or the Secretary of Defense declares that an emergency exists justifying a temporary waiver of the provisions of this subsection and so notifies the appropriate agency or agencies: And provided further, That the provisions of this subsection shall not apply to cargoes carried in the vessels of the Panama Canal Company. Nothing in this subsection shall repeal or otherwise modify the provisions of section 616a of Title 15. * * *.

AID Regulation 1, Section 201.6(N), 22 C.F.R. § 201.6(N):

(N) U.S. flag vessel shipping requirement—

(1) Scope of cooperating country responsibility. The cooperating country will ensure that at least 50 percent of the gross tonnage of all ICA-financed commodities transported to it on ocean vessels during each U. S. fiscal year as well as each quarterly period thereof is transported on privately-owned U. S. flag commercial vessels. The foregoing requirement applies separately for dry bulk carrier shipments, dry cargo liner shipments (i) from the U.S.; (ii) from Europe and Africa; (iii) from the area of the Near East and South Asia; (iv) from Latin America and Canada; and (v) from the area of the Far East. If the foregoing requirement is not met with respect to shipments made during any fiscal year or quarter thereof, the cooperating country will pay promptly to the Director upon demand whatever amount, reimbursed by ICA for commodities, marine insurance, and transportation in shipments directed to the cooperating country during that period of time, as the Director in his discretion shall consider necessary to effect a compliance by the cooperating country with the foregoing requirement for that period of time.

(2) Non-availability of U. S. flag vessels. Any cooperating country may at any time apply to the Office of Transportation, ICA, Washington, D. C., for an administrative determination with respect to any proposed shipment that no privately-owned U. S. flag commercial vessel is available for such shipment at

fair and reasonable rates for such a vessel. In the event that the Office of Transportation shall make such a determination of non-availability, it will advise the cooperating country thereof. Tonnage involved in any or all shipments included in the determination of non-availability of U. S. flag vessels may or may not be excluded from the total tonnage of the fiscal year and the relevant quarter thereof for at least 50 percent of which the cooperating country must ensure transportation on U. S. flag vessels. The determination concerning such exclusion shall be made by the Office of Transportation after a review of all pertinent factors relating to all ICA-financed shipments to the cooperating country during the relevant fiscal year and quarterly period, and the cooperating country shall be advised thereof by the Office of Transportation.

Pub. Law 87-195, Pt. I, § 102, Sept. 4, 1961, 75 Stat. 424, 22 USC § 2151:

It is the sense of the Congress that peace depends on wider recognition of the dignity and interdependence of men, and survival of free institutions in the United States can best be asserted in a world-wide atmosphere of freedom.

To this end, the United States has in the past provided assistance to help strengthen the forces of freedom by aiding peoples of less developed friendly countries of the world to develop their resources and improve their living standards, to realize their aspirations for justice, education, dignity, and respect as individual human beings, and to establish responsible governments.

The Congress declares it to be a primary necessity, opportunity, and responsibility of the United States, and consistent with its traditions and ideals, to renew the spirit which lay behind these past efforts, and to help make a historic demonstration that economic growth and political democracy can go hand in hand to the end that an enlarged community of free, stable, and self-reliant countries can reduce world tensions and insecurity.

It is the policy of the United States to strengthen friendly foreign countries by encouraging the development of their free economic institutions and productive capabilities, and by minimizing or eliminating barriers to the flow of private investment capital.

* * * * *

Also, the Congress reaffirms its conviction that the peace of the world and the security of the United States are endangered so long as international communism continues to attempt to bring under Communist domination peoples now free and independent and to keep under domination peoples once free but now subject to such domination. It is, therefore, the policy of the United States to continue to make available to other free countries and peoples, upon request, assistance of such nature and in such amounts as the United States deems advisable and as may be effectively used by free countries and peoples to help them maintain their freedom. Assistance shall be based upon sound plans and programs; be directed toward the social as well as economic aspects of economic development; be responsive to the efforts of the recipient countries to mobilize their own resources and help themselves; be cognizant of the external and internal pressures which hamper their growth; and shall emphasize long-range development assistance as the primary instrument of such growth.

* * * * *

It is the sense of the Congress that assistance authorized by this chapter should be extended to or withheld from the government of South Vietnam, in the discretion of the President, to further the objectives of victory in the war against communism and the return to their homeland of Americans involved in that struggle.